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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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The Federal Power Commission petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-23a) is reported at 510 F.2d 1264. The initial order of the Federal Power Commission (App. C, *infra*, pp. 26a-35a), its order clarifying the prior order (App. D, *infra*, pp. 36a-40a), and its order denying rehearing (App. E, *infra*, pp. 41a-45a), are

reported at 50 FPC 289, 50 FPC 1293, and 50 FPC 1780, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1975 (App. B, *infra*, pp. 24a-25a). On June 27, the Chief Justice extended the time for filing a petition for a writ of certiorari to August 2, 1975. On August 1, the Chief Justice further extended the time for filing a petition for a writ of certiorari to September 1, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether the Federal Power Commission properly determined that it lacked the power, in ruling on a proposed wholesale rate increase, to remedy the alleged anticompetitive impact of the utility's charging a higher rate on its jurisdictional wholesale sales than it charged on direct retail industrial sales, which are not subject to the Commission's jurisdiction.

STATUTES INVOLVED

Sections 201, 205, and 206 of the Federal Power Act, 16 U.S.C. 824, 824d, and 824e, are set forth in Appendix F. *infra*, pp. 46a-51a.

STATEMENT

1. On May 31, 1973, Arkansas Power & Light Company (APLC) filed a wholesale rate increase pursuant to Section 205(d) of the Federal Power Act, 16 U.S.C. 824d(d). Thereafter, certain of APLC's wholesale customers, including respondents Conway Corporation, *et al.* (Conway), sought intervention and moved to reject the rate increase on the ground that APLC "participates in anticompetitive activity and that the proposed rate increase would 'squeeze' [them] out of competition with respect to [retail] sales to industrial customers" (App. C, *infra*, p. 28a).[1]

On July 31, 1973, the Commission issued an order which accepted the tariff sheets for filing, suspended their effectiveness for five months and set the matter for hearing to determine the justness and reasonableness of the proposed rate. The Commission, however, refused to allow Conway to introduce evidence of alleged anticompetitive activities, since Conway had not demonstrated any relief "which is within this Commission's authority to direct" even if the allegations were true (App. C, *infra*, p. 28a). However, the Commission invited the respondents to file an amended petition setting forth requested relief which

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[1] Like many large utilities, APLC makes sales of electricity both at wholesale for resale (subject to the Commission's jurisdiction) and at retail, directly to industrial customers (not subject to the Commission's jurisdiction). APLC competes with some of its wholesale customers for retail business.

they believed to be within the Commission's authority to direct (*ibid.*).

In their amended petition respondents urged "that the Commission reduce the [wholesale] rate sought by APLC to eliminate the price squeeze" (App. D, *infra*, p. 37a). The Commission again concluded that the relief sought was beyond its power to grant (*ibid.*). The Commission reasoned that in setting the just and reasonable rate, it is required to allow—and only to allow—recovery of properly allocated costs—"[w]holesale rates must recover allocated wholesale costs" (App. A, *infra*, p. 38a). The difficulty with the relief proposed by respondents was that the "suggested relief is a rate related not to wholesale costs but rather related to APLC's industrial rates," which rates are "under the sole jurisdiction of the state commission and not the Federal Power Commission" (*ibid.*). Thus a " 'price squeeze,' in and of itself, does not constitute anticompetitive behavior by APLC given the fact that any wholesale rates we approve must be based on allocated wholesale costs," regardless of the basis used by the state commission to set direct industrial rates (*ibid.*).

Since it could provide no remedy under the Federal Power Act, the Commission determined that it could properly dispose of Conway's objections "without a hearing and extended investigation." *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747, 762 (App. D, *infra*, p. 39a).

2. Upon review, the court of appeals rejected the Commission's analysis and remanded the orders. The court acknowledged that Sections 205 and 206 of the Federal Power Act, 15 U.S.C. 824(d) and 824e, apply only to "transmission[s] or sale[s] subject to the jurisdiction of the Commission," but held that the Commission had the authority under those sections to remedy "claims of discrimination between rates for two classes of service, only one of which is 'subject to the jurisdiction of the Commission' " (App. A, *infra*, pp. 12a-13a).

Accepting the assertion of Conway that the price differential between APLC's proposed wholesale rate and its nonjurisdictional retail industrial rate would make "it impossible for [Conway] to maintain parity with APLC in competing for retail customers" (*Id.* at p. 3a), the court found that the Commission had the authority to modify the proposed wholesale rate, if necessary, to relieve the "price squeeze" (*Id.* at pp. 20a-23a). The court recognized that the Commission could not approve a wholesale rate which failed to recover properly allocated wholesale costs (*Id.* at p. 22a); however, the court reasoned that after ensuring that "both the retail rate and the proposed wholesale rate" are "within a zone of reasonableness," the Commission could select a wholesale rate "in the lower range of the zone of reasonableness" and provide relief (*ibid.*).

REASONS FOR GRANTING THE WRIT

1. Under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, the Commis-

sion has authority to eliminate discrimination between sales which are subject to its jurisdiction. However, the Commission has no authority under the Act to remedy a claim of discrimination between a jurisdictional wholesale rate and a nonjurisdictional direct industrial rate.

The Federal Power Act limits the jurisdiction of the Commission to "the sale of electric energy at wholesale in interstate commerce," 16 U.S.C. 824a(b). Accordingly, Section 205(b), 16 U.S.C. 824d(b), prohibits discrimination between "sales subject to the jurisdiction of the Commission." That section provides, in part:

> No public utility shall, *with respect to any transmission or sale subject to the jurisdiction of the Commission* * * * maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or classes of service. [Emphasis supplied.]

Similarly, Section 206(a) of the Federal Power Act, 16 U.S.C. 824e(a), limits the Commission's power to the remedy of a discrimination in a "sale subject to the jurisdiction of the Commission." [2]

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[2] The Commission has always viewed its authority as limited to the prevention of undue discrimination "among wholesale customers." *Alabama Electric Cooperative, Inc.* v. *Alabama Power Company*, 38 FPC 962, 974-975 (1967). See also, *St. Michaels Utilities Commission* v. *Eastern Shore Public Service Co.*, 35 FPC 591, 595 (1966); *Southwestern Public Service Company*, 33 FPC 343, 346 (1965); *Jaspan* v. *Philadelphia Electric Co.*, 1 FPC 561, 565 (1938).

The court of appeals declined to give the words of the statute their plain meaning, arguing instead that if Congress had wanted to limit the Commission's authority to the consideration of discrimination among rates which are the subject of the Commission's jurisdiction, it would have prohibited the maintenance of unreasonable differences in rates "between classes of service subject to the jurisdiction of the Commission" (App. A. *infra*, p. 15a) However, Section 205 (b) already limits the Commission's jurisdiction "to any transmission or sale subject to the jurisdiction of the Commission." Under the reasoning of the court of appeals, this language would be mere surplusage.[3]

Our ~~hearing~~ reading of the plain language of Sections 205 (b) and 206(a) is supported by the legislative history of the Federal Power Act, which discloses that the drafters assiduously strove to limit the jurisdiction of the Federal Power Commission to the regulation of *inter*state rates and to assure that *intra*state rates be kept within the separate jurisdiction of the state utility commissions. This intent is evidenced by the following colloquy between Representative Petengill

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[3] Equally unpersuasive is the court's interpretation of the phrase "subject to the jurisdiction of the Commission" in Section 206(a) as limited to assuring that any sanction imposed by the Commission to remedy anticompetitive conduct be directed to the jurisdictional rate (App. A, *infra*, p. 16a). Such an interpretation would also render the phrase surplusage since Section 201 of the Act limits the jurisdiction of the Commission to "the sale of electric energy at wholesale in interstate commerce."

of the House Committee on Interstate and Foreign Commerce and Mr. Dozier Devane, one of the principal drafters of Title II of the Federal Power Act, when the Wheeler-Rayburn Bill was before the Committee: [4]

> Mr. Petengill: You say this bill gives the Power Commission jurisdiction over wholesale energy in interstate transmission.
>
> Mr. Devane: Yes.
>
> Mr. Petengill: Suppose the retail rate or wholesale rates in intrastate are fixed by the State Commission, and were so low that for the company to exist it had to charge exhorbitant rates for its wholesale interstate business. Then would not the doctrine of the Shreveport case apply?
>
> Mr. Devane: No sir.
>
> * * * *
>
> Mr. Devane: The interstate rate should be determined upon its reasonableness, its reasonableness without regard to what the intrastate rate is.
>
> Mr. Petengill: That is what it should be.
>
> Mr. Devane: And the intrastate rate should be determined upon its reasonableness.

This colloquy evidences a clear intent to limit the Commission's authority to a consideration of the wholesale rate level, and to preclude regulation of non-

[4] Hearings before the House Interstate and Foreign Commerce Committee on H.R. 5423, 74th Cong., 1st Sess., March 8, 1935, p. 503.

jurisdictional retail rate level. Thus the Federal Power Act envisions that the determination of the justness and reasonableness of wholesale rates be made independent of, and without reference to, the retail rate. Yet, under the decision of the court of appeals, the Commission's determination of the justness and reasonableness of the jurisdictional wholesale rate must be made on the basis of a retail level which is subject to the sole jurisdiction of the state commission.

2. *a.* The court of appeals further erred in supposing that the Commission could remedy an alleged discrimination between jurisdictional wholesale rates and nonjurisdictional direct industrial rates by adjustment of the wholesale rate. In setting "just and reasonable" rates the Commission must allow a utility to recover properly allocated costs. As the Commission said (App. D, *infra*, p. 38a): "Wholesale rates must recover allocated wholesale costs." Thus the rate set by the Commission is wholly a function of costs: it must do no more—and no less—than allow recovery of costs plus reasonable return.

The wholesale electric utility rate is, therefore, an improper vehicle for consideration of non-cost factors. This court recently recognized the inability of a regulatory agency to give adequate measure to such factors in ratemaking proceedings in *Aberdeen and Rockfish Railroad Company* v. *S.C.R.A.P.*, Nos. 73-1966 and 73-1971, decided June 24, 1975. In that case the Court concluded that "the standards of the Act are broad enough to permit consideration of en-

vironmental factors, even at general revenue proceedings," but added (slip op. p. 29, n. 21):

> At the same time, standard ratemaking criteria limit the power of the ICC to force railroads to transport recyclable materials at deficit rates no matter how much the environment would be benefited thereby and no matter how much environmental injury would be caused by not doing so. Under present statutes, for example, the railroads could not be required to reduce rates on recyclables to zero.

While purporting to recognize the statutory factors which define and limit the Commission's ratemaking authority, the court of appeals found sufficient "latitude" in wholesale ratemaking to permit the Commission to remedy a price squeeze by lowering that rate (App. A, *infra*, p. 22a). The court argued that there is a "zone of reasonableness" for such rates and that the Commission can "at the very least * * * put wholesale rates at the lower range of the zone of reasonableness, when it finds anticompetitive conduct" (*ibid.*).

However, the "zone of reasonableness" is both an inadequate and inappropriate weapon with which to attack a "price squeeze." The Commission's aim in setting wholesale rates for electric utilities is always to set them at the lowest rate consistent with the public interest. The Commission does not locate a "zone of reasonableness" and then select a rate within the zone.[5] Rather, the Commission selects the single proper rate on the basis of its assessment of the cost evidence.

The typical controversy in a utility rate is not over the *valuation* of specific cost items, but concerns whether specific items of known value, such as advertising costs, may properly be recovered. While the Commission must necessarily make judgments with respect to these disputes, these judgments do not create a "zone of reasonableness." The standards for the resolution of such disputes have no relation at all to allegations of anticompetitive conduct.[6] It would be simply irrational to disallow an item of cost, such as advertising costs, upon an allegation that the retail industrial rate is set too low.

The only "zone of reasonableness" which might be found in utility ratemaking is the range of poten-

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[5] In setting area rates for natural gas producers, the Commission customarily finds a range of reasonable rates and selects a rate within the range. See, *e.g.*, *Placid Oil Co., et al.* v. *FPC*, 483 F.2d 880 (C.A. 5), affirmed *sub nom. Mobil Oil Corp.* v. *FPC*, 417 U.S. 283. The "zone of reasonableness" in producer ratemaking exist because, given the lists of available data and methodology, the costing of natural gas production is necessarily somewhat imprecise, and because average, rather than individual company-by-company costs are investigated. There is, for all practical purposes no "zone of reasonableness" in electric utility ratemaking because precise data is available and rates are reviewed on a company-by-company basis.

[6] *Mississippi River Fuel Corp.* v. *F.P.C.*, 163 F.2d 433, at 437 (D.C. Cir. 1947); See also, *West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio*, 292 U.S. 63 (1935); A.J.G. Priest "Utility Advertising and Other Operating Expenses" 75 Public Utilities Fortnightly 23, 27 (April 29, 1965).

tially appropriate rates of return on net investment rate base, specifically the rate of return on common equity. But even here there is no room to consider allegations of anticompetitive conduct. The Commission must select a rate of return on common equity which is commensurate with the risks associated with the investment, and which will be sufficient to maintain existing equity investment as well as attract new investment at reasonable costs.[7] Only in this manner may this Commission assure the financial integrity of the utility at the lowest reasonable costs. It makes no sense, and would indeed be impermissible, to select a rate on equity which did anything other than fulfill these criteria, because of allegations of price squeeze.

There is, in consequence, no "reasonable nexus between the matters subject to [the Commission's] surveillance and those under attack on anticompetitive grounds." *City of Lafayette, Louisiana* v. *S.E.C.*, 454 F.2d 941, 955 (C.A.D.C.) aff'd, *sub nom. Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747.

b. The Court's holding that the Commission should provide the remedy for "price squeeze" is due

[7] See, *e.g.*, *Bluefield Waterworks & Improvements Co.* v. *P.S.C.*, 262 U.S. 679; *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591. The Commission does permit any interested party to submit relevant evidence, including evidence of monopolization, which bears upon the risk associated with investment. *Pacific Gas & Electric Co.*, Docket No. E-8929 and E-7777, August 22, 1974, pending on petition for review, No. 74-3430 (C.A. 9). Conway's allegations, however, were not of this kind; rather, it asked the Commission to determine the wholesale rate by reference to nonjurisdictional retail rates.

to its conclusion that it was the wholesale rate which would make "it impossible for petitioners to maintain parity with APLC in competing for retail customers" (App. A, *infra*, p. 3a). However, the operative factor may not be the wholesale rate level at all but the retail industrial rate as prescribed by the State commission. Furthermore, Conway's alleged inability to compete with APLC for the retail industrial market may be attributable to its own retail rate design, which may require its industrial rates to bear a disproportionate share of the retail costs. By concluding that the wholesale rate level is responsible for the "price squeeze," however, the court oversimplified the problem and vastly underestimated the burden which it imposed upon the Commission.

To adequately investigate a "price squeeze" allegation, it may be necessary for the Commission to investigate not only the propriety of the retail rate level of the filing utility but also the retail rates of the complaining resale customer to ensure that these latter rates are, themselves, not improperly high. The administrative burden associated with this task is enormous.[8] In view of the very limited and inef-

[8] The threshold problem would be whether federal or state standards should be applied in reviewing the propriety of these non-jurisdictional rates. Moreover, the Commission would be confronted with the evidentiary problem of obtaining all of the necessary data from complaining customers, many of whom are unregulated municipal electric systems which do not maintain the type of records and accounts necessary for an adequate cost review by the Commission. Even assuming

fectual relief which the Commission might provide, the imposition of this burden is unwarranted.

3. The Commission has not been granted the power to adjudicate antitrust issues as such, outside the regulatory powers it possesses. *California* v. *F.P.C.*, 369 U.S. 482, 486. Accordingly, the authority of the Commission to consider the anticompetitive implications of its regulatory decisions is not without limitation and, in appropriate circumstances, the Commission can summarily dispose of allegations of anticompetitive conduct without hearing and investigation. *Gulf States Utilities Co.* v. *F.P.C.*, *supra* at 762-763.* The decision of the court below that the Commission must consider antitrust allegations for which it can provide no meaningful relief, conflicts with these decisions and will severely impair the Commission's rate review functions under the Federal Power Act.

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that all of the necessary data could be obtained, its assessment would greatly increase the length and complexity of rate proceedings.

* This is not to say that this Commission will not consider antitrust allegations in rate proceedings where the issue is properly raised and where relief within this Commission's authority is available to grant. Cf. *Pacific Gas and Electric Company*, Docket No. E-7777, order issued March 14, 1974; *Wisconsin Public Service Corporation*, Docket No. E-8867, order issued August 23, 1974; and *Carolina Power and Light Company*, Docket No. E-8887, order issued August 26, 1974.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor.

JOHN H. BURNES, JR.,
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SEPTEMBER 1975.

I authorize the filing of this petition.

ROBERT H. BORK
Solicitor General

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2207

CONWAY CORPORATION ET AL., PETITIONERS,

v.

FEDERAL POWER COMMISSION, RESPONDENT,

ARKANSAS POWER & LIGHT COMPANY, INTERVENOR.

United States Court of Appeals
District of Columbia Circuit

Argued Oct. 23, 1974
Decided April 4, 1975

Municipally owned and cooperative electrical systems petitioned for review of order of Federal Power Commission denying their petition to intervene in proceeding on proposal for wholesale electric rate increase by utility from which these systems purchased power and with which they competed at retail level. The Court of Appeals, Leventhal, Circuit Judge, held that such order was so definitive in character and of such a significant and immediate impact on petitioners as to meet criterion for reviewability, that the Commission's authority and responsibility to weigh discriminatory effects in rate proceedings extends to claims of discrimination between rates for two classes

of services, only one of which is subject to the jurisdiction of the Commission, and that the Commission's jurisdiction to review a petition to set aside or reduce a utility's wholesale electric rate increase permits consideration of the utility's alleged purpose, and effect, to forestall its customers from competing with it at retail.

Case remanded with directions.

Before TAMM, LEVENTHAL and MacKINNON, Circuit Judges.

Opinion for the Court filed by Circuit Judge LEVENTHAL.

LEVENTHAL, Circuit Judge:

In this case, we hold that the Federal Power Commission's jurisdiction to review a petition to set aside or reduce a utility's wholesale electric rate increase permits consideration of the utility's alleged purpose, and effect, to forestall its customers from competing with it at retail.

On May 31, 1973, Arkansas Power & Light (AP&L) filed with the FPC a wholesale rate proposal that would increase electricity rates to municipally owned systems by 22.6 percent, and to cooperatives by 34.9 percent. Petitioners are municipally owned and cooperative electrical systems that (a) purchase from AP&L all or a major portion of the electricity they resell to retail customers; and (b) compete with AP&L at retail for large industrial customers, and have historically been able to match

AP&L tariffs for such loads. AP&L's filing would, in some cases, elevate its wholsale rates to petitioners above its retail rates, thus making it impossible for petitioners to maintain parity with AP&L in competing for retail customers.

Petitioners filed a timely Protest, Motion to Reject, and Petition to Intervene with the Commission. They alleged, *inter alia*, that AP&L's increase in wholesale prices represented "an attempt to squeeze petitioners or some of them out of competition, and to make them more susceptible to the persistent attempts of the company to take over the publicly owned systems in the State," [1] and asked that the proposed rate increase be rejected.

The FPC, by Order of July 31, 1973, accepted, and suspended until January 1, 1974, the proposed rate schedule. Intervention by Petitioners was limited to matters other than the alleged driscrimination. In its Order denying intervention on this question the Commission referred to its earlier order in Indiana & Michigan Electric Co., 49 FPC 1232 (1973), which set minimum standards that must be met before protestants can obtain intervention and hearing on anti-competitive issues and avoid disposition made summarily: The petition must clearly specify "1) the facts relied upon, 2) the anti-competitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct." Petitioners, the FPC held, had failed to meet the third criterion.

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[1] Petitioners' Protest, Motion to Reject, and Petition to Intervene, June 28, 1973, J.A. 8.

Petitioners' Amended Petition to Intervene asked that the proposed wholesale rates be reduced to eliminate the price squeeze. It was denied by a Commission order of October 29, 1973, on the same ground. The FPC clarified its former order by characterizing petitioners' suggested relief as "a rate related not to wholesale costs but rather related to [AP&L's] industrial rates," which are not within the Commission's jurisdiction.[2] A subsequent petition for rehearing was denied, and a petition for review was filed in this court.

We hold that the FPC has jurisdiction to consider anti-competitive allegations of the sort raised by petitioners and indeed must consider them in determining whether the rate proposed by AP&L is a "just and reasonable" rate.

I. FINALITY OF ORDER BELOW

The Commission contends that the order denying intervention on this issue was not of the "definitive character" required by section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b) (1970), as construed in FPC v. Metropolitan Edison Co., 304 U.S. 375, 384, 58 S.Ct. 963, 82 L.Ed. 1408 (1938). Although petitioners have been allowed to intervene in the Commission hearing to raise other, unrelated challenges to the proposed schedules, we find this an appropriate order for review at this time.

[2] Order of October 29, 1973, Denying Amended Petition to Intervene and Clarifying Prior Order, J.A. 102.

We may profitably follow the lead of the Supreme Court in defining finality in "pragmatic terms. *See* Cox Broadcasting Corp. v. Cohn, —— U.S.. ——, 95 S.Ct. ——, 42 L.Ed.2d ——, 43 U.S.L.W. 4343 (U.S., March 3, 1975). We are to make "a realistic appraisal of the consequences" of the challenged action.[3] An order is reviewable when it "imposes[s] an obligation, den[ies] a right or fix[es] some legal relationship."[4] We look to whether there has been "an effective deprivation of [petitioners'] rights."[5] We find the order denying intervention here so definitive in character and of such a significant and immediate impact on petitioners as to meet this criterion.

Petitioners raise a question of law, which will not be better defined by further development of the record. The FPC has taken a firm position that petitioners have no legal right to FPC consideration of their antitrust allegations. Because it sees the bar to be jurisdictional, the FPC considers the issue closed. It is not deferring consideration of the ques-

[3] Isbrandtsen Co. v. United States, 93 U.S.App.D.C. 293, 297, 211 F.2d 51, 55, cert. denied sub nom. Japan-Atlantic & Gulf Conference v. United States, 347 U.S. 990, 74 S.Ct. 852, 98 L.Ed. 1124 (1954).

[4] Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948).

[5] National Airlines, Inc. v. CAB, 129 U.S.App.D.C. 180, 187, 392 F.2d 504, 511 (1968), cited in Thermal Ecology Must Be Preserved v. AEC, 139 U.S.App.D.C. 366, 368, 433 F.2d 524, 526 (1970).

tion [6] or considering the matter in other proceedings.[7] On the contrary, the Commission has repeatedly refused in other proceedings [8] to consider similar allegations. Thus, we are presented with a definitive administrative conclusion on a recurring question of law that will shape numerous unrelated proceedings if judicial review is deferred. Disruption of the orderly process of adjudication is a factor to be considered.[9] But our review now on this point does not interfere with the FPC's conduct of the proceeding it has already put under way.

There is a need here for swift resolution of the anti-competitive jurisdictional issue, not only be-

[6] *Compare* Overseas National Airways, Inc. v. CAB, 426 F.2d 725 (2d Cir. 1970), where the coutr refused to review a refusal by the CAB to expand the scope of a proceeding concerning transatlantic passenger charter authority to include the issue of transatlantic cargo charter authority. The court stressed that the CAB had not suggested that the excluded issue would remain closed indefinitely, but had merely deferred consideration. 426 F.2d at 727-28.

[7] *Compare* Ecology Action v. AEC, 492 F.2d 998, 1001 (2d Cir. 1974).

[8] *E.g.*, Southern California Edison Co., 50 F.P.C. 836 (1973); Florida Power & Light Co., 50 F.P.C. 1626 (1973); Order of January 3, 1974, in Union Electric Co., Docket No. E-8215; Opinion No. 681 of January 7, 1974, in Commonwealth Edison Co., Docket No. E-7578; Order of February 28, 1974, in Public Service Co. of Oklahoma, Docket No. E-8242; Order of March 14, 1974, in Pacific Gas & Electric Co., Docket No. E-777; Order of April 19, 1974, in Wisconsin Electric Co., Docket No. E-8619.

[9] Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71, 91 S.Ct. 203, 27 L.Ed. 2d 203 (1970).

cause it is recurring, but because the FPC's determination has a substantial and immediate impact on the parties that cannot be remedied by subsequent agency action.[10] The competitive context in which petitioners operate sets the stage for our analysis. In competing with supplying companies, municipal and cooperative systems seek to maintain customer satisfaction with the quality and price of their service in order to attract new industries and to retain existing customers; continued satisfaction is also necessary to ensure voter support for the municipal systems. At its most basic level, this competition represents a struggle on the part of the municipal and cooperative systems to preserve their independence from their supplier insofar as they compete at retail. The context has been described by Professor Meeks in Concentration in the Electric Power Industry: The Implant of Antitrust Policy, 72 Colum.L.Rev. 64, 78 (1972):

> To illustrate, assume that a municipal system is buying all or most of its power from a neighboring private system. There exists between the two an indirect, but very real competition to serve their respective areas since the state commission or the voting public might well decide to allow the system that furnished the cheapest power to serve both areas. Unless the municipality has access to alternative sources of economical power . . . the neighboring system can virtually control the performance of the

[10] *Cf.* Atlanta Gas Light Co. v. FPC, 476 F.2d 142, 147 (5th Cir. 1973).

> municipal system through its control over the wholesale price of power. . . . Such control by selling systems is probably very common and very effective, primarily because of the almost universal control over transmission by the dominant selling system in an area. This kind of "unfair" competition is usually directed at municipals and cooperatives but also occasionally at small private systems, particularly when the seller is seeking to absorb the smaller system by merger.[11]

Through its position as supplier, AP&L will be able, if there is no FPC jurisdiction to consider the public interest in AP&L's discriminatory levels, to affect the quality and price of petitioners' retail service in such a way as to tilt the scales of competition in its favor.

The refusal of the FPC to consider discriminatory treatment between jurisdictional and nonjurisdictional rates will inevitably and immediately affect the

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[11] *See also* Hearings on S. 218 Before the Senate Comm. on Commerce, 89th Cong., 1st Sess., ser. 89-38, at 68 (1965):

To the large privately-owned electric utility a retail customer, even a large industry, is simply a customer. However, a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a competitor in the fringe area where the two systems are contiguous, but may also be a direct or potential competitor for the commercial and industrial businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.

The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipal systems succumb to purchase offers by investor-owned wholesale suppliers.

context in which long-term contracts will be bargained for, and relatively irrevocable location decisions will be made by potential industrial customers. Judge Friendly has found—we need not go so far—these considerations determinative of the question of finality even where the agency has held that it has jurisdiction and is continuing to investigate an issue on its merits.[12]

The immediate effect of the FPC's order on the shape of decision-making in the industry is not gainsaid by the possibility that the FPC may set aside the wholesale rate increase in the rate proceeding, and order a refund of over-charges made after the suspension terminated. First, such relief would in a sense be adventitious, and totally divorced from any consideration of the discrimination problem that is claimed to be part of the public interest. Second, the discriminatory charges may last for years before the wholesale rate is reduced, if it is reduced, on other

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[12] [T]he Court held it sufficient that the order, although merely declaratory, "touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done." . . . [T]he consideration that prompts us to hold the order reviewable—is the likelihood that before the Commission's investigation is concluded and judicial review can be had, NYSA and ILA will be bargaining for a new agreement; it is important for them to know whether any assessment formula that may be included therein will be subject to Commission review.

New York Shipping Ass'n v. FMC, 495 F.2d 1215, 1219-20 (2d Cir. 1974), *quoting* Frozen Food Express v. United States, 351 U.S. 40, 44, 76 S.Ct. 569, 100 L.Ed. 910 (1956).

grounds. The initial rate filing in this case, for example, was made on May 31, 1973, and hearings are still being held. Third, the potential discriminatory impact is not limited to the parties in this proceeding, but affects the competitive relationship of suppliers and customer-competitors throughout the country.[13]

The FPC contends that petitioners are not injured because they can still raise "valid" anticompetitive issues—those regarding discriminatory treatment between wholesale customers—in the Commission proceeding. This begs the question: It is clear that the Commission will not consider the claims that are raised by petitioners and will not give them the protection they request and may need. Indeed, if we were to peek ahead into the merits to decide jurisdiction, this case would be more appropriate for sustaining jurisdiction on the ground of the strong likelihood of reversal.[14]

II. MOOTNESS

On March 18, 1974, AP&L filed an application for a 22.6 percent increase in its retail electric rates with

[13] *See, e.g.*, cases cited in note 8 *supra*.

[14] Jurisdiction to review exclusionary rulings may be sustained even absent significant injury where, in the words of Judge Friendly, the agency's ruling is "so flagrantly wrong and demonstrably critical as to make it apparent that the agency is not merely courting the possibility of reversal but is running into the certainty of it if the ultimate decision should be against the proponent of the evidence." Ecology Action v. AEC, *supra*, 492 F.2d at 1001.

the Arkansas Public Service Commission. We cannot remand for consideration of this changed factual situation unless we order a reversal of the FPC, since, unreversed, the FPC will abide by its determination that it lacks jurisdiction to consider such factual allegations. Without further factual consideration by the Commission we are unable to evaluate whether the question has been mooted by AP&L's state application, particularly in light of petitioners' contentions that the proposed retail rate increase is not sufficiently great and that AP&L has indicated that it intends to file a second wholesale increase.

III. THE MERITS

A. *The Statute*

All parties agree that the FPC has the authority to weigh certain allegations of anticompetitive effects, and is indeed required to do so. The "important and broad regulatory power" vested in the Commission by Title II of the Public Utility Act of 1935, 49 Stat. 803, was recently described by the Supreme Court in Gulf States Utilities Co. v. FPC, 411 U.S. 747, 758-59, 93 S.Ct. 1870, 1878, 36 L.Ed.2d 635 (1973), as "clearly carr[ying] with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to . . . directives contained in §§ 205, 206 [16 U.S.C. §§ 824d, 824e (1970)] . . ." *See also* Otter Tail Power Co. v. United States, 410 U.S. 366, 373-74, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); City of Huntingburg v. FPC, 162 U.S.App.

D.C. 236, 241-242, 498 F.2d 778, 783-84 (1974). *Gulf States Utilities* and *Otter Tail*, like the present case, concerned alleged anticompetitive efforts by utilities engaged in wholesale and retail sales to squeeze municipal systems and rural cooperatives that both competed with and purchased power from them. In *Gulf States* certain cities protested, under § 204 of the Federal Power Act, 16 U.S.C. § 824c (1970), a utility's application for authority to issue bonds; the cities alleged that the proceeds from the proposed bonds would be used to finance anticompetitive activities. *Otter Tail* was a civil action under § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 2 (1970), based on various alleged anticompetitive activities—such as refusals to sell, refusals to wheel, the institution of litigation, and the denial of access to other suppliers by means of Otter Tail's transmission systems—directed against existing and proposed municipal systems. Neither case raised the issue, now before this court, of discriminatory effects caused by differences between wholesale and retail rates.

Sections 205 and 206 of the Federal Power Act, which were passed as part of Title II, expressly require the Commission to weigh discriminatory effects in rate proceedings. Section 205(b), 16 U.S.C. § 824d (b) (1970), prohibits any public utility "with respect to any transmission or sale subject to the jurisdiction of the Commission," from maintaining "any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of services." [15] Section 206(a), 16 U.S.C. § 824e(a) (1970), requires the FPC to determine the just and reasonable rate whenever it, after a hearing, finds that the rate demanded "by any public utility for any transmission or sale subject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory or preferential." [16]

The question presented here is whether the FPC's authority, and responsibility, under §§ 205 and 206, extend to claims of discrimination between rates for two classes of service, only one of which is "subject to the jurisdiction of the Commission."

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[15] Section 205(b) states in full:

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

[16] Section 206(a) provides, in full:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

The FPC and AP&L contend that the Commission cannot grant the relief requested by petitioners because it only has jurisdiction over the wholesale sale. In support of their argument, they point to the Congressional hearings on the Federal Power Act,[17] which suggest that the phrase "subject to the jurisdiction of the Commission" was added to § 205(b) in response to a request by the National Association of Railroad and Utilities Commissioners, which sought to avoid giving the FPC the "power over intrastate rates" that the Supreme Court, in Houston, East and West Texas Rwy. Co. v. United States (Shreveport Case), 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed.1341 (1914), found had been granted to the Interstate Commerce Commission. During the floor debates Representative Cole of Maryland explained the action of the House Committee in safeguarding the jurisdiction of the states: "[W]e have tried—and I think successfully—to avoid the injection into the Federal control, which this title confers, the extension thereof into intrastate activities in the way that the Shreveport case might permit." [18]

The "power over intrastate rates" and "the extension [of Federal control] into intrastate activities" that the *Shreveport* case permitted to the ICC goes far beyond the relief sought by petitioners, for the

[17] Hearings on H.R. 5423 and S. 1725 Before the Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess., pt. 3, at 1624 (1935). *See also id.*, pt. 1, at 503; H.R.Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935).

[18] 79 Cong.Rec. 10384 (1935).

Supreme Court in *Shreveport* upheld the power of the ICC to combat discrimination under § 3 of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, 380, by issuing an order directed toward *intrastate* rates—in that case an order that would permit carriers to increase their intrastate rates above the level approved by the state commision.[19] Petitioners do not ask the FPC to modify or to authorize the modification of retail rates. They have only asked that the *interstate* rate increase proposed by AP&L be rejected [20] or reduced [21] if the anticompetitive allegations are found to have merit. The legislative history is not adverse to FPC jurisdiction in the case at bar, particularly when it is taken in the context of the broadly procompetitive purposes of Title II.

Turning to text, a common sense reading of the statutory language reveals no requirement that both rates involved in a pattern of discrimination fall within the jurisdiction of the Commission. If Congress had intended so to limit the reach of the statute it could have prohibited the maintenance of unreasonable differences in rates "between classes of service subject to the jurisdiction of the Commission." A

[19] The development of federal regulation of intrastate rates after *Shreveport* is discussed by Justice Frankfurter in his dissent in Public Service Commission v. United States, 356 U.S. 421, 429, 430-34, 78 S.Ct. 796, 2 L.Ed.2d 886 (1958).

[20] Petitioners' Protest, Motion to Reject, and Petition to Intervene, June 28, 1973, J.A. 29.

[21] Petitioners' Amended Petition to Intervene, August 22, 1973, J.A. 93.

fair interpretation of the statute as it is drafted is, instead, that any sanction imposed by the FPC to remedy an anticompetitive practice is to be addressed to the jurisdictional rate, and that any discrimination in rates that does not involve jurisdictional service, *i. e.*, discrimination between nonjurisdictional classes of service, is left completely to the state regulatory bodies.

The FPC's position would leave a regulatory gap —no institution would have authority to consider an undue preference between wholesale and retail rates, even where that preference was deliberately instituted for the purpose of clogging competition, and to reduce interstate wholesale rates. A legislative intention to achieve such a regulatory gap is not to be presumed unless expressly presented. United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 85 S.Ct. 1517, 14 L.Ed.2d 466 (1965); Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682-83, 74 S.Ct. 794, 98 L.Ed. 1035 (1954).

On the issue before us, we see a statute that confers plenary jurisdiction to review the interstate wholesale rate and to provide relief addressed to such wholesale rate in order to further the public interest. The Commission has latitude to address the matter in consultation with, and after joint hearings with, the state commission. But it cannot wash its hands of the public interest problem as one totally beyond its jurisdiction.

B. *Ability of FPC to Consider and Investigate Nonjurisdictional Matters*

This interpretation of §§ 205 and 206 may on occasion require the FPC to consider AP&L's retail rate structures. FPC contends this "would result in this Commission interjecting itself in to an area in which it has no jurisdiction." [22] However, the FPC concedes that it is authorized to consider nonjurisdictional matters when necessary to the exercise of its jurisdictional authority. As it acknowledges in its brief, "[l]ike Section 5(a) of the Natural Gas Act, Section 206(a) of the Federal Power Act authorizes the Commission to consider retail costs. And, . . . Section 206 (b) specifically authorizes the Commission to undertake an investigation into certain nonjurisdictional sales." [23]

Interpreting § 5(a), the Supreme Court has held that "[t]he Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction." Panhandle Eastern Pipe Line Co. v. FPC, 324 U.S. 635, 646, 65 S.Ct. 821, 827, 89 L.Ed. 1241 (1945). In *Panhandle Eastern*, the Court reviewed a rate proceeding in which the Commision had examined a utility's retail business in order to allocate earnings between the regulated and unregulated

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[22] Order of October 29, 1973, Denying Amended Petition to Intervene and Clarifying Prior Order, J.A. 102.

[23] FPC Br. at 31.

business. That case is distinguishable, to be sure, but the underlying principle is one that permits the FPC to consider matters which would be completely nonjurisdictional taken by themselves, but are appropriate for consideration when germane to the meaningful execution of a jurisdictional function.

There are further indications that the Federal Power Act does not contemplate that the FPC is to operate in an airtight chamber, insulated from nonjurisdictional factors. In presenting Title II, the House Committee expressly said: "The new parts . . . contain throughout direction to the Federal Power Commission to receive and consider the views of State commissions." [24] Numerous statutory provisions implement this vision, authorizing the Commission to consider nonjurisdictional factors and to cooperate with state regulatory authorities. Section 209(b), 16 U.S.C. § 824h(b) (1970), permits the Commission to confer with any state commission "regarding the relationship between rate structures, costs, accounts, charges, practices, and regulations of public utilities subject to the jurisdiction of such State Commission and of the Commission," and to hold joint hearings with the state authorities. Section 311, 16 U.S.C. § 825j (1970), authorizes and directs the FPC "to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy . . . whether or not otherwise subject to the jurisdiction of the Commission, including

[24] H.R.Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935).

the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality . . . of any State or municipality or other political subdivision of a State." *See also* § 202(a), 16 U.S.C. § 824a(a) (1970), which requires the FPC to give notice to state commissions and "afford each such State commission reasonable opportunity to present its views and recommendations, and . . . receive and consider such views recommendations" before it establishes any regional district for the coordination and interconnection of electric facilities; and § 302(b), 16 U.S.C. § 825a(b) (1970), which has a similar provision with regard to the fixing by the FPC of rates of depreciation for licensees and public utilities.

In other contexts, the Commission has embraced its responsibility to consider intrastate rate relationships that touch on rate proceedings within its jurisdiction. For example, in Southwestern Public Service Co., 33 FPC 343 (1965), the Commission compared the conditions under which a utility's various wholesale customers rendered retail service in order to evaluate whether differences proposed in wholesale rates—different rates to investor-owned wholesale customers and to cooperative wholesale customers—"would seriously prejudice the competitive business relationships" between customers in the two groups. 33 FPC at 350.

C. *Authority of the FPC to Grant the Remedy Requested*

The Commission has the authority under § 206 to take unduly discriminatory effects into account in determining a just and reasonable wholesale rate, Gulf States Utilities Co. v. FPC, *supra*. This is the relief that petitioners seek. They do not ask the FPC to increase or decrease nonjurisdictional retail rates, but only to consider the evidence presented by the wholesale customers and, if anticompetitive effects are found to exist, to modify the concededly jurisdictional rates proposed by AP&L to the extent appropriate.[25]

The FPC erroneously construes the petition to intervene as requesting the Commission to "subordinate [its] jurisdiction to that of the state commissions by basing wholesale rates on retail rates." [26] Petitioners do not ask that the Commission subordinate its discretion to the state commissions or even that it tie the wholesale rate to the retail rate. Rather, they ask the Commission to consider their allegations of anticompetitive conduct, if established, as a factor in deciding whether the proposed rate is just and reasonable, as it does when allegations of anticompetitive effects between two jurisdictional rates

[25] Petitioners' Amended Petition to Intervene, August 22, 1973, J.A. 93; Petitioners' Petition for Rehearing, November 5, 1973, J.A. 116.

[26] Order of December 5, 1973, Denying Petition for Rehearing, J.A. 119.

are raised. Northern Natural Gas Co. v. FPC, 130 U.S.App.D.C. 220, 225, 399 F.2d 953, 958 (1968). The retail rates charged by AP&L in a market in which it is competing with its own customers are part of the factual context in which the proposed wholesale rate will function; they do not set an authoritative standard for what is a just and reasonable wholesale rate.

The Commission further contends that it cannot grant petitioners' requested relief because "[w]holesale rates must recover allocated wholesale costs" [27] and petitioners suggest "that the Commission reduce the proposed wholesale rates without regard to costs." [28] Because the Commission has raised a jurisdictional bar and refused to investigate petitioners' allegations, we cannot, at this stage, determine whether a wholesale rate low enough to abolish any discriminatory effects would fail to recover allocated wholesale cost. By arguing that any consideration of noncost factors to reduce a proposed rate necessarily produces a rate that fails to recover allocated costs, the Commission seems to assume that there is a single cost-recovering rate. Rather, there is a zone of reasonableness:

> Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is

[27] Order of October 29, 1973, Denying Amended Petition to Intervene and Clarifying Prior Order, J.A. 102.

[28] FPC Br. at 32.

> unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied "reasonableness" but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller.[29]

When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves.[30] There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain

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[29] Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251, 71 S.Ct. 692, 95 L.Ed. 912 (1951) (Jackson, J.).

[30] The FPC has acknowledged its ability to deal with this situation:

> It occurs to us that one rate in its relation to another rate may be discriminatory, although each rate *per se*, if considered independently, might fall within the zone of reasonableness. There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned. The relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed.

Otter Tail Power Co., 2 FPC 134, 149 (1940).

retail revenues in order to curb the retail competition of its wholesale customers.

The case is remanded for further proceedings not inconsistent with this opinion. To avoid any possibility of misunderstanding, we expressly note that we do not intend any indication whether petitioners are entitled to relief on the merits, and we specifically note that on the remand the Commission will have full latitude to consider the significance of AP&L's rate changes subsequent to the Commission's order (of October 29, 1973) rejecting Petitioners' proposed submissions.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

No. 73-2207

[Filed Apr. 4, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

CONWAY CORPORATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

ARKANSAS POWER & LIGHT COMPANY, INTERVENOR

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Before: TAMM, LEVENTHAL and MACKINNON, Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that this case is hereby remanded to the Federal Power

Commission, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: April 4, 1975

Opinion for the Court filed by Circuit Judge Leventhal

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Docket Nos. E-8250
E-8071
E-8142

ARKANSAS POWER AND LIGHT COMPANY

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF SHEETS, DENYING MOTION TO REJECT, CONSOLIDATING PROCEEDINGS, ESTABLISHING HEARING PROCEDURES, INITIATING PROCEEDING UNDER SECTION 206 OF THE FEDERAL POWER ACT, AND PERMITTING INTERVENTION

(Issued July 31, 1973)

On June 1, 1973, Arkansas Power and Light Company (APLC) tendered for filing proposed changes in its Rate Schedule U3—Resale Service to Municipally Owned and Privately Owned Electrical Distribution Systems [1] and its proposed changes would in-

[1] Benton Municipal Light and Water Works, Water and Light Commission of Hope, City of North Little Rock Arkansas, City of Osceola, Arkansas, City of Prescott, Arkansas, City of West Memphis, Arkansas, Citizens Light & Power.

crease APLC's revenues from sales and service by $1,969,462 for the twelve month period ending July 31, 1972. The proposed effective date is August 1, 1973. (FPC Rate Designations are shown in Appendix A)

APLC states that no facilities will be installed or modified except to accommodate additional capacity and/or to provide points of delivery for customers' load growth in the future. Furthermore, APLC states that the Company does not propose to apply the 1.3% monthly additional facilities charge provided for in the new rate schedules to any presently installed transmission and distribution facilities. Finally, APLC states that the rate of return from service to the municipally owned and privately owned systems is 3.74% and from service to rural electric cooperatives the rate of return is a negative .15%.

The Company states that the proposed rates will enable the Company to improve its rate of return, which it believes is vital to attract the necessary amount of capital in order to provide adequate service to its present and future customers.

Notice of filing was issued on June 15, 1973, with protests and petitions to intervene due on or before June 28, 1973. A Protest, Motion to Reject, and Petitions to Intervene of Publicly Owned Whole-

[2] Conway Corporation, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative Inc., North Arkansas Electric Cooperative.

sale Customers [1] (Customers) was timely filed June 28, 1973. In support of its motion to reject, Customers first allege that the APLC's participates in anti-competitive activity and that the proposed rate increase would "squeeze" Customers out of competition with respect to sales to industrial customers.

By order issued May 31, 1973, in *Indiana and Michigan Electric Company* Docket No. E-7740 we set minimum standards for those who would raise anti-competitive issues. These standards are that the petition to intervene must clearly specify 1) the facts relied upon, 2) the anti-competitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct. Our review of Customers' petition to reject or intervene indicates that it fails to specify the relief which is within this Commission's authority to direct. Accordingly, we shall limit Customers' participation in this proceeding to matters other than the alleged anti-competitive activities. This action is without prejudice to Customers' right to file an appropriate amended petition which sets forth relief for the alleged anti-competitive conduct that is within this Commission's authority to direct.

Customers also allege several other grounds in support of its motion to reject. Firstly, Customers

[1] Conway Corporation, Benton Municipal Light & Water Works, Hope Water & Light Commission, City of North Little Rock, Arkansas, City of Osceola, Arkansas, City of Prescott, Arkansas, City of West Memphis, Arkansas, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative, Inc.

argue that by filing a split test year ending July 31, 1973, APLC has effectively understated its revenues. Secondly, Customers argue that certain factors utilized by APLC in construction of its cost of service are questionable; e.g., the utilization of a single peak allocation for its basis demand allocation. Thirdly, Customers argue that allowance of the nuclear adjustment clause would put the nuclear plant in its rate base while continuing to book interest during construction, since it does not anticipate putting the nuclear plant into operation prior to Spring, 1974. Fourthly, the Customers argue that the introduction of an embedded debt cost adjustment provision and a tax adjustment clause should be rejected as not meeting the justification for escalation factors set for in Commission's Opinion 633, *New England Power Company* (Docket No. E-7541) and if not rejected, should not be allowed to operate automatically. Fifthly, the Customers state that allowance of APLC's "additional facilities charge" would allow APLC to recover twice for all future line extension-recovery once by the "additional facilities charge" and secondly, recovery would be had in the increase cost of service.

In the event that the filing is not rejected, Customers urge the Commission to suspend the proposed rate schedule changes for the full five month statutory period provided for in Section 205(e) of the Federal Power Act, set the matter for hearing and request permission to intervene in these proceedings. Customers' motion to reject raises substantive issues

which cannot be summarily decided and require an evidentiary hearing which we have set forth herein.

On review of APLC's June 1, 1973, filing at Docket No. E-8250 and Customers' motion to reject or in the alternative suspend the filing indicates that the proposed rates have not been shown to be just and reasonable and may be unjust, unreasonable, preferential or unduly discriminatory or otherwise unlawful and may require a full evidentiary hearing.

On March 8, 1973, APLC tendered for filing in Docket No. E-8071, an initial Power Service Agreement between the City Water and Light Plant of the City of Jonesboro, Arkansas (Jonesboro) and APLC to become effective June 1, 1973.

APLC described the Agreement as lasting for a term of at least seven years, beginning on or about June 1, 1973, and providing for an initial block of at least 5,000 KW during the term of the Agreement. Jonesboro is not now served by APLC and there is no interconnection between their respective systems. APLC states that the city electrical system has need of additional firm capacity and energy to supplement its own generation and other sources of firm power supply in order to adequately supply the city's customers. APLC further states that the rates and charges provided for in the Agreement were arrived at through negotiations with Jonesboro, and they are designed to produce a return approximately equal to the Company's overall rate of return.

The Agreement provides that the demand charge shall be increased by one cent ($.01) per KW of

Contract Demand for each full one tenth of one percent (0.1%) increase in the Company's embedded cost of long-term debt above the 5.87% existing as of July 31, 1972. Furthermore, the energy charge will be increased or decreased to reflect the nearest one-thousandth (.001) mill per kilowatt-hour, the change in the cost of fuel utilized in Company-owned generating stations.

APLC's filing in Docket No. E-8071 was noticed on March 22, 1973 with motions of protest or intervention due on or before April 12, 1973. No motions to protest or intervene were received.

APLC's March 8, 1973, filing at Docket No. E-8071 became effective June 1, 1973. Our review indicates that the rates have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful. Therefore, we shall institute an investigation under Section 206 of the Federal Power Act to determine the justness and reasonableness of those rates.

We note that in a related case in Docket No. E-8142, the Commission in an order issued July 3, 1973, instituted an investigation under Section 206 of the Federal Power Act with respect to an embedded debt cost adjustment provision contained in the Power Coordination, Interchange and Transmission Agreement dated April 20, 1972 between APLC and Arkansas Electric Cooperative Corporation. Since the adjustment clause in Docket No. E-8142 is identical to the provision in Docket No. E-8250 and Docket No. E-8071, common issues of law and fact

are raised. We will accordingly order consolidation of these dockets. Consistent with this action, we will amend our order of July 3, 1973, in Docket No. E-8142 to provide dates for service of evidence and hearing consistent with our action herein.

The Commission finds:

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates and charges contained in APLC's Rate Schedules as proposed in Docket No. E-8250 filed May 31, 1973.

(2) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Federal Power Act that the Commission enter upon a hearing under Section 206 of the Federal Power Act to determine the justness and reasonableness of the Initial Power Service Agreement in Docket No. E-8071 filed March 8, 1973.

(3) The disposition of this proceeding, should be expedited in accordance with the procedures set below.

(4) In the event this proceeding is not concluded prior to the termination of the suspension period herein ordered in Docket No. E-8250 the placing of the rate and charges applied for in this proceeding into effect, subject to refund with interest, while pending Commission determination as to their justness and reasonableness, is consistent with the pur-

pose of the Economic Stabilization Act of 1970, as amended.

(5) Good cause exists for consolidation of Docket Nos. E-8250, E-8142, and E-8071.

(6) Constistent with our action consolidating Docket Nos. E-8250, E-8071 and E-8142, the procedural dates set forth in our July 3, 1973, order in the latter docket should be amended as hereinafter ordered.

(7) The petition to intervene of Customers should be granted as hereinafter ordered.

(8) The petition to reject in Docket No. E-8250 should be denied.

The Commission orders:

(A) The above enumerated rate schedules in Docket No. E-8250 filed May 31, 1973, are accepted for filing and their effectiveness is suspended until January 1, 1974.

(B) APLC is required in Docket No. E-8250 and in E-8071 to file within 60 days of the issuance of this order an updated cost of service for the twelve month test period ending June 30, 1973 (in accordance with Regulations 35.13 and 35.12 respectively).

(C) APLC's March 8, 1973 filing at Docket No. E-8071 constituting an initial Power Service Agreement with Jonesboro is hereby accepted for filing to become effective June 1, 1973 as requested.

(D) An investigation into the justness and reasonablenes of the initial Power Service Agreement with Jonesboro at Docket No. E-8071 is hereby instituted under Section 206 of the Federal Power Act.

(E) Docket Nos. E-8250, E-8142 and E-8071 are hereby consolidated and set for hearing in accordance with the schedule established in ordering paragraph (F) hereof.

(F) Pursuant to the authority of the Federal Power Act, including Sections 205, 206, 308, and 309 thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, a public hearing shall be held commencing with a pre-hearing conference on February 5, 1974, at 10:00 A.M., EDT in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D. C. 20424, concerning the lawfulness of the rate increase and adjustment clauses set forth above.

(G) On or before January 4, 1974, the Commission Staff shall serve its prepared testimony and exhibits. The prepared testimony and exhibits of any or all intervenors shall be served on or before January 15, 1974. Any rebuttal evidence by APLC shall be served on or before January 29, 1974. Cross-examination on the evidence filed will commence on February 12, 1974.

(H) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for the purpose (see Delegation of Authority, 13 C.F.R. 3.5(d)), shall preside at the hearing in this proceeding, and shall prescribe relevant procedural matters not herein provided, and shall control the proceeding in accordance with the policies expressed in the Commision's Rules of Practice and Procedure.

(I) The above-named petitioners are hereby permitted to intervene in this proceeding, subject to the rules and regulations of the Commission: *Provided, however*, that the participation of such intervenors shall be limited to matters affecting rights and interests specifically set forth in the respective petitions to intervene, except Customer's participation is limited to matters other than the alleged anti-competitive activities, and *Provided, further*, that the admission of such intervenors shall not be construed as recognition by the Commission that they, or any of them, might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(J) Customer's motion to reject in Docket No. E-8250 is denied.

(K) Nothing contained in this order shall relieve the Applicant of any responsibility imposed by the Economic Stabilization Act of 1970, (Public Gas 91-370, 84 Stat. 799, as amended by Public Law 92-15, 85 Stat. 38), or by any Executive Order or rules and regulations promulgated pursuant to such Act.

(L) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission:

(SEAL)

Mary B. Kidd,
Acting Secretary.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

WHOLESALE ELECTRIC RATES—Denial of Rehearing

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Docket Nos. E-8250
E-8071
E-8142

ARKANSAS POWER AND LIGHT COMPANY

ORDER DENYING AMENDED PETITION TO INTERVENE AND CLARIFYING PRIOR ORDER

(Issued October 29, 1973)

On July 31, 1973, we issued an order in this proceeding which granted a certain petition to intervene [1] filed June 28, 1973, with the condition that the participation of the intervenors would be limited to matters other than the anticompetitive activities alleged.

[1] Parties included in the joint petition are as follows: Conway Corporation, Benton Municipal Light and Water Works, Hope Water and Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

Relying on our decision in *Indiana and Michigan Electric Company* (I&M) order, Docket No. E-7740 issued on May 31, 1973, we found that said petition failed to specify the relief which was within the Commission's authority to grant. We permitted petitioner, however, the right to file an amended petition which would set forth the relief for the alleged anti-competitive conduct that is within this Commission's authority to grant.

On August 22, 1973, petitioners filed an amended petition reciting arguments and statements similar to those made in its initial petition to intervene. Specifically, petitioners allege that APLC's proposed rates is unduly discriminatory vis-a-vis the Company's retail industrial rates. The specific relief petitioners seek in the context of the proceeding is "that the Commission reduce the rate sought by APLC to eliminate the price squeeze . . ."

The relief sought by Petitioners is beyond the authority granted to us under the Federal Power Act. Under the Federal Power Act this Commission is charged with the responsibility for reviewing rate applications to insure that the rates proposed are just and reasonable. APLC has submitted its full evidentiary presentation including a cost of service as well as testimony and exhibits of their witnesses which they state support the subject wholesale rate increase. That evidence, including APLC's allocation of its costs to its wholesale service, is, of course, subject to review and cross-examination by all parties including the intervenors and is also of course subject to re-

view and decision thereon by the Presiding Trial Judge assigned to the case as well as the Commission itself.

Wholesale rates must recover allocated wholesale costs. Customers' suggested relief is a rate related not to wholesale costs but rather related to APLC's industrial rates. However, APLC's industrial rate level and the accounting and rate making principles underlying that rate level is under the sole jurisdiction of the state commission and not the Federal Power Commision. We have no jurisdiction over APLC's industrial rates, and we do not choose to open this hearing to an examination of those rates. Such an action would require a detailed analysis of APLC's retail cost of service and would result in this Commission interjecting itself into an area in which it has no jurisdiction.

Petitioners' allegation of "price squeeze" in and of itself, does not constitute anticompetitive behavior by APLC given the fact that any wholesale rates we approve must be based on allocated wholesale costs. To approve rates which recover less than those costs would produce grave consequences, since such action would be tantamount to imposing confiscatory rates on APLC and possible subsidization of APLC's wholesale service by APLC's industrial customers or other retail customers of APLC over whom we have no jurisdiction. Moreover, Petitioners' proposal would subordinate our authority to set wholesale rates to the retail ratemaking jurisdiction of the state commission.

Customers' amended petition cites language in *Gulf States Utilities Co.* v. *F.P.C.*, et al.,[2] which it asserts directs the Commission to eliminate rate structures which are anticompetitive by reason of a price squeeze. However, as we stated in our order in *Southern California Edison Company*, Docket No. E-8176, issued on September 21, 1973, the *Gulf States* opinion clearly states that its ruling is not to be interpreted as saying that the Commission must always hold a hearing on the antitrust issue.[3] The Supreme Court also noted without objection, that the Court of appeals had observed that the summary disposition of the anti-trust argument in a proceeding might be acceptable provided such disposition does not go unexplained.[4]

Finally, petitioners state that they interpret the Commission's order of July 31, 1973, to mean that the Commission "accepts (1) the specification of 'facts relied upon' in the original Petition, and (2) the specification of the 'anti-competitive practices challenged' relied upon in the original Petition . . ." The facts relied upon by petitioners do not, in and of themselves, prove the validity of the matters asserted and if a full evidentiary hearing had been required on this issue, the facts relied upon would require further development.

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[2] *Gulf States Utilities Co.* v. *F.P.C., et al,* 411 U.S. 747 at p. 758 (1973).

[3] *Ibid* at p. 762.

[4] *Ibid* at p. 762.

The Commission finds:

(1) Based on our review of the filing by APLC, and the pleadings of the parties herein, we find that no anticompetitive issue has been presented which would require further development in this proceeding.

(2) We find the relief sought by the petitioners to be beyond the scope of this Commission's jurisdiction, contrary to the purposes of the Federal Power Act and inappropriate in this proceeding, the purpose of which is to review the justness and reasonableness of APLC's proposed wholesale rates.

The Commission orders:

The amended petition, filed by Customers, is hereby denied.

By the Commission.

[SEAL]

KENNETH F. PLUMB
Secretary

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

WHOLESALE ELECTRIC RATES—Denial of Rehearing

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Arkansas Power and Light Company)

Docket Nos. E-8250
E-8142

ORDER DENYING PETITION FOR REHEARING

(Issued December 5, 1973)

On November 5, 1973, a customer group [1] (Customers) of Arkansas Power and Light Company (APLC) filed a Petition For Rehearing of our order issued in this docket on October 29, 1973. In the October 29 order, we denied, *inter alia*, Customers' Amended Petition For Intervention and ruled that the antitrust allegations made by Customers therein would not be considered in the hearing ordered. Spe-

[1] Parties included in the petition are: Conway Corporation, Benton Municipal Light and Water Works, Hope Water and Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers' Electric Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

cifically, we found that no anticompetitive issue had been presented which required further development in an evidentiary hearing since the relief requested by the Customers was ". . . beyond the scope of this Commission's jurisdiction, contrary to the purposes of the Federal Power Act and inappropriate in this proceeding, the purpose of which is to review the justness and reasonableness of APLC's proposed wholesale rates." [2]

Customers are in error in their allegation that our order is inconsistent with the Commission's position in the *Gulf States* case.[3] As indicated by Customers, we stated in *Gulf States* that a remedy might be provided for anticompetitive conduct in a rate case. However, the particular remedy sought by Customers in this proceeding is beyond the authority granted us by Section 205 and 206 of the Federal Power Act.

Customers refer us to the *Panhandle Eastern* case [4] which Customers maintain supports the proposition that the language of 205(b) of the Federal Power Act grants this Commission authority "to lower the wholesale rate subject to its jurisdiction in order to eliminate the unreasonable difference between classes of service here alleged." Customers also state that *Panhandle Eastern* is not susceptible to the inter-

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[2] *Arkansas Power and Light Company*, Docket Nos. E-8250, E-8071 and E-8142, Order issued October 29, 1973, page 4.

[3] *Gulf States Utilities Co.*, v. *FPC*, 411 U.S. 747 (1973).

[4] *Panhandle Eastern Pipeline Co.*, v. *FPC*, 324 U.S. 635, 646-647 (1945).

pretation placed upon that case by the Commission in an order issued November 2, 1973 in *Southern California Edison Co.*, Docket No. E-8176, at page 2.

We disagree with Customers' reading of the *Panhandle* case and reaffirm our interpretation as stated in our order issued November 2, 1973 in *Southern California.* As we stated in that order, "In *Panhandle Eastern*, the issue was the propriety of the Commission's determination of the proper allocation of costs to *Panhandle Eastern's* wholesale service." In ascertaining the costs associated with the wholesale service, this Commission was called upon to consider "what costs are fairly attributable to each business, wholesale and retail, and what the resultant rate for wholesale business should be." [5] As we indicated in our October 29, 1973 order in this docket, we fully intend to design wholesale rates which recover properly allocable wholesale costs. In the process of designing proper wholesale rates, we certainly will consider the cost responsibility of APLC's direct industrial service in determining cost properly allocable to APLC's wholesale service. This process of designing proper wholesale rates is, however, an entirely different matter from Customers' position that we must subordinate our jurisdiction to that of the state commissions by basing wholesale rates on retail rates.

We note that this Commission has not been reluctant to consider antitrust issues in rate cases in

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[5] *Ibid.*, at 647.

those instances where we have the statutory authority to provide relief. For instance, in *Carolina Power and Light Company*,[6] this Commission on its own motion instituted a proceeding under Section 206 of the Federal Power Act to investigate an Availability Clause in a wholesale rate tariff for sales to municipal customers with regard to the possible anticompetitive nature of such clauses.

Finally, we note that Customers' petition for rehearing seems to interpret our order of October 29, 1973 as barring all anticompetitive issues from consideration in this proceeding. While the Commission has denied the particular antitrust issues raised by Customers in this proceeding, this is not to say that antitrust issues which are the proper subject of this Commission's jurisdiction could not be considered if properly raised.

The Commission finds:

The Petition for Rehearing of Customers, filed November 5, 1973, raises no new facts or issues of law requiring a modification of our order issued in this docket on October 29, 1973.

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[6] Docket No. E-7918, order issued on March 12, 1973.

The Commission orders:

The Petition for Rehearing, filed by Customers on November 5, 1973, is hereby denied.

By the Commission.

[SEAL]

Kenneth F. Plumb,
Secretary.

APPENDIX F

DECLARATION OF POLICY; APPLICATION OF PART; DEFINITIONS

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [49 Stat. 847; 16 U.S.C. 824(a)]

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the

transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. [49 Stat. 847-848; 16 U.S.C. 824(b)]

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. [49 Stat. 848; 16 U.S.C. 824(c)]

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale. [49 Stat. 848; 16 U.S.C. 824(d)]

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. [49 Stat. 848; 16 U.S.C. 824(e)]

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [49 Stat. 848; 16 U.S.C. 824(d)]

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [49 Stat. 851; 16 U.S.C. 824d(a)]

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. [49 Stat. 851; 16 U.S.C. 824d(b)]

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect

or relate to such rates, charges, classifications, and services. [49 Stat. 851; 16 U.S.C. 824d(c)]

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [49 Stat. 851-852; 16 U.S.C. 824d(d)]

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer

the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 852; 16 U.S.C. 824d(e)]

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rate, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. [49 Stat. 852; 16 U.S.C. 824e (a)]

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852; 16 U.S.C. 824e(b)]

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No. 75-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL., RESPONDENTS

BRIEF OF ARKANSAS POWER & LIGHT COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-342

IN THE

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OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

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CONWAY CORPORATION, ET AL., RESPONDENTS

BRIEF OF ARKANSAS POWER & LIGHT COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION BELOW

The Petitioner makes adequate reference to the reports of the opinion of the court of appeals,[1] the initial order of the Federal Power Commission,[2] its order clarifying the prior order,[3] and its order denying rehearing.[4] The court opinion and the Commission's orders are contained as appendices in the Petition, and this Brief shall make references to those appendices where appropriate.

[1] *Conway Corp.* v. *F.P.C.*, 510 F.2d 1264 (D.C. Cir. 1975).

[2] *Arkansas Power & Light Co.*, 50 F.P.C. 289 (1973).

[3] *Arkansas Power & Light Co.*, 50 F.P.C. 1293 (1973).

[4] *Arkansas Power & Light Co.*, 50 F.P.C. 1780 (1973).

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth in the Petition.

QUESTION PRESENTED

Whether the court of appeals erred by holding that the Federal Power Commission has the statutory authority to adjudicate allegations of discrimination between the rates for jurisdictional wholesale sales of electricity and retail sales of electricity, which are not subject to the Commission's rate reviewing power?

REASONS FOR GRANTING THE WRIT

1. The issue presented by this case is of fundamental importance to the Federal Power Commission's (Commission) responsibility under the Federal Power Act (16 U.S.C. §§791, *et seq.*) to establish just and reasonable rates for the sale of electric energy at wholesale in interstate commerce. By erroneously concluding that the Commission has the jurisdiction and resultant obligation to adjudicate claims of discrimination between interstate wholesale electric rates and retail electric rates, which are indisputably not subject to the Commission's jurisdiction, the court of appeals has imposed an unwarranted and heavy burden on the Commission. Arkansas Power & Light Company (AP&L or Company)[5] and other electric companies, which have both wholesale and retail customers, may be unduly penalized if the Commission's wholesale rate reviewing authority is subordinated to the retail rate jurisdiction of state utility commissions.

2. a. The decision below is erroneous and should be reviewed since it relies improperly on this Court's decision in *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635 (1945). Although the court of appeals noted correctly that the *Panhandle* case is "distinguishable," it expressed the

[5]It is important to note that AP&L has not, in fact, engaged in any anticompetitive activity, nor has it made any attempt to "squeeze" its wholesale customers out of business, contrary to the implication of the court below (Petition, App. A, p. 3a). That the Company has not engaged in any anticompetitive activity is supported by the following excerpt from the U.S. Department of Justice, Antitrust Division, letter of December 12, 1971, to the then Atomic Energy Commission in connection with the Company's application to construct a nuclear power plant. As the Department of Justice stated:

> [AP&L] presently has dominance in electric bulk power supply and transmission in a major portion of Arkansas. But we have found no evidence that [AP&L] has exercised that control to the detriment of competition. (36 Fed. Reg. 25240, December 30, 1971)

view that the "underlying principle [of *Panhandle*] is one that permits the FPC to consider matters which would be completely nonjurisdictional taken by themselves, but are appropriate for consideration where germane to the meaningful execution of a jurisdictional function." (Petition, App. A, p. 18a) In actuality, not only is the precise holding of *Panhandle* inapposite to the issue at hand, the "underlying principle" of the case is clearly contradictory to the court's decision below.

Panhandle dealt with a Commission investigation under §5(a) of the Natural Gas Act (15 U.S.C. §717d(a)) following a complaint that the pipeline's interstate wholesale rates were unjust and unreasonable.[6] Since Panhandle's nonjurisdictional business was insignificant in comparison with its interstate wholesale business, the Commission did not consider it necessary to make an allocation of costs between the regulated and unregulated phases of the company's operations, as would normally be done in a proceeding involving a rate change by a regulated utility with a substantial degree of unregulated

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[6]Section 5(a) of the Natural Gas Act is analogous to §206(a) of the Federal Power Act (Petition, App. F, p. 51a) and states:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint . . . shall find that *any rate* . . . collected by any natural gas company in connection with any transportation or sale of natural gas, *subject to the jurisdiction of the Commission*, . . . *is unjust, unreasonable, unduly discriminatory*, or *preferential*, the Commission shall determine the just and reasonable rate . . . and shall fix the same by order . . . . (15 U.S.C. §717d(a)) (Emphasis supplied)

The meaning of "subject to the jurisdiction of the Commission" is set out in §1(b) of the Natural Gas Act:

> The provisions of this chapter shall apply . . . to the *sale in interstate commerce of natural gas for resale* for ultimate consumption . . . but shall not apply to any other . . . sale of natural gas . . . . (15 U.S.C. §717(b)) (Emphasis supplied)

business. Instead of attempting to segregate costs and properties between the jurisdictional and nonjurisdictional classes of service, an attempt which would have been "theoretical" and "impractical" (324 U.S. at 646) in view of the unified character of the business and the fact that plant devoted exclusively to the nonjurisdictional business was less than one-sixth of one percent of the company's entire plant investment, the Commission adopted the more practical procedure of allocating all of the earnings from the entire business in excess of 6½ percent return to the interstate wholesale business (*id.* at 642). By this procedure, the Commission determined that Panhandle's jurisdictional rates were excessive and should be lowered.

This Court upheld the Commission's method in light of the "exceptional circumstances" of the case (*id.* at 647), but stated:

> We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both. *Otherwise the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business and the Commission would transgress the jurisdictional lines which Congress wrote into the Act.* (*Id.* at 641, 642) (Emphasis supplied)

The Court then went on to say that §5(a), which as stated above is analogous in pertinent part to §206(a) of the Federal Power Act, "does not of course give the Commission authority to disregard the jurisdictional lines which Congress has drawn between interstate wholesale sales and direct industrial sales so as to level the profits between the two classes of business." (*Id.* at 647)

Unlike Panhandle, AP&L's operations involve a significant degree of nonjurisdictional business; accordingly, in

compliance with the Commission's regulations, AP&L filed allocated cost of service studies detailing the costs associated with its jurisdictional business. The jurisdictional and nonjurisdictional aspects of AP&L's operations are easily discernible and, thus, there is no reason whatsoever why the Commission should be required to consider the Company's retail rates in establishing a just and reasonable level for the interstate wholesale rates.[7]

2. b. The decision below is also incorrect and should be reviewed since it contravenes this Court's reasoning in *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945), a companion rate investigation case to *Panhandle*, *supra*, wherein the Court upheld the Commission's procedure for allocating costs between the regulated and nonregulated portions of a pipeline's overall business. The Court emphasized that the problem was to allocate to each class of the business its fair share of the costs and observed that if the revenues from the jurisdictional business exceeded the costs allocable to that phase of the business, such rates could be lowered. Significantly, with respect to the determination of the proper wholesale rate, the Court added:

[7]As the Commission stated in its Petition, it must set the level of AP&L's wholesale rates on the basis of the cost of serving those wholesale customers, as demonstrated by the allocated cost of service studies that the Company has filed. This is consistent with the Commission's rate reviewing authority under the Federal Power Act, whereby it is restricted to selecting "the single proper rate on the basis of its assessment of the cost evidence." (Petition, p. 11) The Court's landmark decision in *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), recognizes that the Commission has the responsibility in the rate reviewing area to determine the rate level necessary to recover the utility's jurisdictional costs and produce a return sufficient to maintain its financial integrity. *Cf. Bluefield Water Works and Improvement Comm'n* v. *Public Service Comm'n*, 262 U.S. 679 (1923)

> It is of course immaterial that the revenues from the intrastate sales or the direct industrial sales may exceed their costs, since the authority to regulate those phases of the business is lacking. (*Id.* at 588)

Further, the concurring opinion stated that "[i]t is true that the Natural Gas Act forbids discrimination only as between regulated rates and does not forbid discriminations between the regulated and nonregulated ones." (*Id.* at 615) The Commission's authority and jurisdiction under the Federal Power Act are no broader. As the statute and decisions of this Court make clear, the Commission should make its rate determinations on the basis of the costs involved in those areas of a company's business over which it has jurisdiction and not on the basis of determinations made by state regulatory bodies.

3. Contrary to the holding of the court below, the Commission's refusal to subordinate its authority under the Federal Power Act to that of state public service commissions by, in essence, establishing wholesale rates on the basis of retail industrial rates, is consistent with the responsibility placed on it by the decision of this Court in *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747 (1973).[8] In *Gulf States*, this Court held that the Commission should consider "in appropriate circumstances the anticompetitive effects of regulated aspects of interstate utility operations."

[8]The misplaced reliance by the court of appeals on *Gulf States*, as precedent for its decision (Petition, App. A, p. 20a), is further reason for granting the writ of certiorari in this case. Earlier in its decision, the court recognized the fact that it was going beyond the holdings of this Court in *Gulf States*, *supra* and *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), when it stated:

> Neither case raised the issue, now before this court, of discriminatory effects caused by differences between wholesale and retail rates. (Petition, App. A, p. 12a)

(*Id.* at 758) In order to determine the "appropriate circumstances" under which antitrust allegations should be considered in a rate proceeding, reference must be made to §§205 and 206 of the statute, the relevant portions of which are set forth in the margin.[9]

As can be readily seen, the Act's declaration of policy limits the jurisdiction of the Commission to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but [such jurisdiction] shall not apply to any other sale of electric energy." (16 U.S.C. §824(b)) In light of the unambiguous language of §§205 and 206, the court of appeals' interpretation that the Commission is duty bound to consider an alleged discrimination in rates for different classes of customers, only one of which is subject to the jurisdiction of the Commission, is patently incorrect.

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[9]Section 205(b) provides:

> (b) No public utility shall, *with respect to any transmission or sale subject to the jurisdiction of the Commission*, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities or in any other respect, either as between localities or as *between classes of service*. (16 U.S.C. §824d(b)) (Emphasis supplied)

Section 206(a) provides:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or *sale subject to the jurisdiction of the Commission*, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. (16 U.S.C. §824e(a)) (Emphasis supplied)

The court's mistaken reading of §§205(b) and 206(a) is further illustrated by reference to pertinent portions of the legislative history of the Act. The colloquy between Representative Pettengill of the House Committee on Interstate and Foreign Commerce and Mr. Dozier Devane, one of the draftsmen of the Federal Power Act, which was cited by the Commission in its Petition[10] clearly shows that the organic statute was intended to fix a sharp jurisdictional line of demarcation between interstate and intrastate rates and, further, that the determination by the Commission of a just and reasonable rate for an electric company's interstate wholesale service should be wholly independent of the state regulated retail rates of that company.

In addition, Representative Cole, one of the sponsors of the statute in its final form, remarked during the House floor debates that the Act was not intended to give the Commission comprehensive intrastate rate jurisdiction coextensive with that given to the Interstate Commerce

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[10] Mr. Pettengill: You say this bill gives the Power Commission jurisdiction over wholesale energy in interstate transmission.

Mr. Devane: Yes.

Mr. Pettengill: Suppose the retail rate or wholesale rates in intrastate are fixed by the State Commission, and were so low that for the company to exist it had to charge exhorbitant rates for its wholesale interstate business. Then would not the doctrine of the Shreveport case apply?

Mr. Devane: No Sir.

* * * *

Mr. Devane: The interstate rate should be determined upon its reasonableness, its reasonableness without regard to what the intrastate rate is.

Mr. Pettengill: That is what it should be.

Mr. Devane: And the intrastate rate should be determined upon its reasonableness. (Petition, p. 8)

Commission (ICC) under the doctrine of the *Shreveport* case:[11]

> As to the jurisdiction of the States and State commissions, I doubt if any State commission or State officials familiar with the bill as it is now before you will say that the jurisdiction of the States has not been safeguarded and protected in a fair and lawful way. In doing so we have tried—and I think successfully—*to avoid the injection into the Federal control, which this title confers, the extension thereof into intrastate activities in the way that the Shreveport case might permit.* (79 Cong. Rec. 10384, June 28, 1935) (Emphasis supplied)

The court of appeals, while specifically recognizing that unlike the ICC the Federal Power Commission cannot review retail rates and pass on their justness and reasonableness, nonetheless concluded that the Commission may have to adjust wholesale rates to comport with retail rate levels (Petition, App. A, pp. 15a-16a). The only conclusion that can be drawn from this holding is that the court has determined that Congress, having limited the exercise of its jurisdiction over the interstate activities of electric utilities so as to immunize local regulation of retail rates from encroachment of federal regulation, left the federally approved rates subject to the vagaries of locally regulated rates.

Such a conclusion is both illogical and impractical and imposes a serious burden on the federal regulatory process. As this Court stated in *U.G.I.* v. *Continental Oil Co.*, 381 U.S. 392, 400 (1965), with regard to the Natural Gas Act, "a regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law." Recently, in *Corporation Comm'n* v. *F.P.C.*, 415 U.S. 961 (1974), the Court affirmed a ruling of the United States District Court for the Western District of Oklahoma that the setting of a statewide minimum price for wellhead gas by the state commission conflicted with the jurisdiction of the Federal Power Commission under the Natural Gas Act and that the federal authority vested in the Commission over wholesale rates for natural gas governed under the supremacy clause.

AP&L submits that the rates established by one jurisdiction cannot be used in determining the appropriate level of rates in the other. The determination of the justness and reasonableness of the wholesale rates of a public utility is to be made by the Commission, applying the provisions of the Federal Power Act, on the basis of operating expenses and capital costs, and not on the basis of the regulatory standards of state commissions. *Cf. F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. at 603.

[11] *Houston, East and West Texas Ry.* v. *United States*, 234 U.S. 342 (1914).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 3, 1975

JOINT APPENDIX OF THE PARTIES

Supreme Court, U. S.
FILED
JAN 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-342

FEDERAL POWER COMMISSION,

Petitioner,

—*v.*—

CONWAY CORPORATION, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED SEPTEMBER 2, 1975
CERTIORARI GRANTED NOVEMBER 11, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-342

FEDERAL POWER COMMISSION,

Petitioner,

—*v.*—

CONWAY CORPORATION, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS—PROCEEDINGS
12-6-73	Petition for review of an order of the Federal Power Commission (m-6)
12-12-73	4-Motion of Arkansas Power and Light Company for leave to intervene (m-12)
1-14-74	Certified index to record (n-3)
3-12-74	25-Petitioner's printed brief
4-4-74	25-Intervenor's (Arkansas Power and Light Company) brief (m-4)
4-12-74	25-Respondent's printed brief (m-10)
4-26-74	25-Petitioner's reply brief (m-25)
5-3-74	10-Joint Appendix
5-23-74	Per Curiam order that the Clerk is directed to schedule this case for argument on the merits as promptly as the business of the Court permits; McGowan and Robb
8-27-74	Per Curiam order by the Clerk for the Court, that the motion for postponement of date set for oral argument is granted and the Clerk is directed to remove this case presently scheduled for argument on September 13, 1974 from the argument calendar and to reschedule it in the normal course of the business of his office
10-23-74	Argued before Tamm, Leventhal and MacKinnon, CJ
4-4-75	Opinion for the Court filed by Circuit Judge Leventhal

DATE	FILINGS—PROCEEDINGS

4-4-75 Judgment remanding case to the Federal Power Commission. (n)

4-23-75 4-Respondent's motion for stay of mandate (m-21)

5-1-75 Per Curiam order that the motion for stay of mandate is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment to June 25th; Tamm, Leventhal, and MacKinnon, CJ

6-23-75 4-FPC's motion to extend stay of mandate (m-23)

6-30-75 Letter from Supreme Court extending time to file certiorari to August 2, 1975

7-7-75 Per Curiam order that the respondent's motion to extend stay of mandate is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's Judgment to July 25th; Tamm, Leventhal, and MacKinnon, CJ

7-23-75 4-FPC's motion to extend stay of mandate (m-23)

8-5-75 Per Curiam order granting respondent's motion to extend stay of mandate to August 2; Tamm, Leventhal and MacKinnon, CJ

8-5-75 Notice from Supreme Court extending time to file petition for certiorari to September 1st

8-11-75 4-FPC's motion to extend stay of mandate to September 1st (m-7)

8-13-75 Per Curiam order directing the Clerk to stay the issuance of the certified copy of this Court's judgment to September 2nd; Tamm, Leventhal and MacKinnon, CJ

9-5-75 Notice of filing petition for writ of certiorari in S.C. No. 75-342 on September 2, 1975

DATE	FILINGS—PROCEEDINGS

11-18-75 Certified copy of Supreme Court order granting petition for writ of certiorari in S.C. #75-342 on November 11, 1975

11-20-75 Letter from Supreme Court stating that certiorari was granted on November 11, 1975 in S.C. No. 75-342 and requesting transmittal of record certified

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket No. E-8250

ARKANSAS POWER AND LIGHT COMPANY

PROTEST, MOTION TO REJECT, AND PETITION TO INTERVENE OF PUBLICALLY OWNED WHOLESALE CUSTOMERS

The undersigned nine city and cooperatively owned electric plants and departments hereby (i) protest the rate schedule amendments filed by the Arkansas Power and Light Company ("AP&L") on May 31, 1973; (ii) move the Commission to reject the proposed changes for the reasons hereinafter stated, and, without waiving any rights with respect to that motion; (iii) petition to intervene as a party in this matter if that filing is not rejected; and (iv) request the Commission to suspend the filing for five months if the filing is not rejected.

I

The names of the petitioners herein are the Conway Corporation (operators of the city owned electric system), Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc.

II

The names, titles and addresses of the persons to whom communications concerning this petition and motion should be addressed are:

Robert C. McDiarmid, Esquire
Sandra J. Strebel, Esquire
Spiegel & McDiarmid
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Washington, D.C. 20037

Mr. James Brewer, Manager
Conway Corporation
Conway, Arkansas 72032

Mr. Wyatt Crawford, Superintendent
Benton Municipal Light and
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Benton, Arkansas 72015

Mr. Garland Medders
Hope Water & Light Commission
Hope, Arkansas 71801

Mayor Robert Rosamond
City of North Little Rock
North Little Rock, Arkansas 72114

Mayor Richard Pruitt
City of Osceola
Osceola, Arkansas 72370

Mayor Larry Wahlquist
City of Prescott
Prescott, Arkansas 71857

Mayor Tilden Rodgers
City of West Memphis
West Memphis, Arkansas 72301

Mr. Carl L. Cross, Manager
Farmers Electric
Cooperative Cooperation
Highway 67 North
Newport, Arkansas 72112

Mr. Dean Hodges, Manager
Mississippi County Electric
Cooperative, Inc.
510 North Broadway
Blytheville, Arkansas 72315

Inasmuch as this petition is filed jointly by nine publically owned entities, it is specifically requested that each of the above names be included on the official service list in this docket, in order to avoid the unnecessary duplication of filing nine petitions to intervene.

III

Petitioners here will, according to AP&L's filing, pay $13,981,539 in the year beginning August, 1973 out of the total wholesale revenues shown of $14,154,383.* According to AP&L's Statement N, the increase proposed to reach these rates is 22.6% for the cities and 34.9% for the cooperatives. Thus it is clear that the petitioners will be directly, and drastically, affected by the proposed change in rates, may be bound by the Commission's action in this proceeding, and that their interests cannot adequately be represented by other parties. Moreover, the municipal utilities here represented are regulatory bodies having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the meaning of Section 1.8(a) of the Commission's Rules of Practice and Procedure.

IV

Insofar as petitioners can ascertain, the sole reason which AP&L has for filing this unilateral rate increase is an attempt to squeeze petitioners or some of them out of competition, and to make them more susceptible to the persistent attempts of the company to take over the publically owned systems in the State. Even though the company has gone to great lengths to make its rate filing difficult to analyze, we shall demonstrate that, by using a standard cost of service analysis and a correct analysis of the revenues to be generated by the rates, AP&L is *already* recovering in excess of a fair rate of return, even under existing rates, without the 22.6 to 34.8% increase it is seeking.

* This should be compared with the revenues shown for the "test year" chosen by AP&L of $8,431,486 from both groups.

Arkansas, as this Commission is aware, is a state vigorously seeking new industry. Industry, and its accompanying payroll and other benefits, can be vitally important to a community in Arkansas, and petitioners, like AP&L, have sought actively to encourage new industrial load. Petitioners have generally sought to match AP&L tariffs for like loads, and have heretofore been able so to do while simultaneously returning to their citizen-consumers revenues sufficient to justify the ownership of the system. By virtue of their generally well-run systems and city administrators, petitioners have succeeded in attracting substantial increases in electrical load.

By this filing, AP&L seeks to force an end to the pre-existing competitive situation. While it here seeks to impose rate increases of 22.6% upon the cities and 34.9% upon the coops, it has indicated no intent of filing to change its own long-standing industrial rates. As will be shown, the proposed rates here are such that it would be impossible for petitioners to sell power to an industrial load of any size at a competitive price with AP&L, since, in many cases, the revenues therefrom would not even cover the incremental power costs to petitioners.

After being advised that AP&L intended to raise its wholesale rates, prior to their first contacts with the undersigned, and without advice of counsel, representatives of petitioners, relying on the representations of AP&L as to its costs, offered AP&L an agreement whereby petitioners would not oppose the wholesale rate filing if AP&L would agree to raise its industrial rates to maintain the historical comparative retail-wholesale competitive situation. AP&L declined this offer. Petitioners regard this as an indication of AP&L's purpose in increasing its rate to them unilaterally and alone.

The impact of the new rate filing upon the competitive situation in Arkansas may be outlined by a few calculations. For example, in the billing month of September, 1972, AP&L's billing comparison shows that West Memphis had a measured demand of 48160 kilowatts (corrected for 60 minute demand) and utilized 23116800

kilowatt hours of energy. Under the P-3 large industrial rate (appended as Attachment A) West Memphis could have purchased its energy (utilizing the actual 15 minute demand shown on its bill for that month from AP&L of 48,552 kilowatts) for $225,869.09. Under the existing U-3 rate, West Memphis actually paid $214,390.90 without discount.* Under the proposed U-3 rate as filed, West Memphis would pay $254,334 without discounts. Obviously, there is a drastic imbalance in the comparative rates introduced by this filing.

More importantly, even on an incremental basis, the proposed rate would make it impossible for petitioners to compete with AP&L for desirable industrial load. For example, a 10 megawatt industrial customer with an 80% load factor for the month ** could purchase power under the P-3 rate for $48,312 (for purposes of this comparison, all fuel clause revenues are excluded on all rates). Even if we assume that only 90% of that demand is registered at the time of a U-3 customer's peak,*** the purchased power cost alone for that load would be $47,450.**** Obviously, none of petitioners could sell for $48,412 energy which they purchased for $47,450 with any consideration of their own investment or their own expenses. Similarly, for the same 10 megawatt customer, with a 60% load factor, the total costs (again stated without fuel clause for either calculation) would be $42,984 under the P-3 rate while the purchased power cost to serve the customer (at 90% of demand on peak) would be $41,834 ***** for a U-3 customer under the proposed rate. The differential is simply not

* As developed *infra*, the discounts for plant credit and long term contracts are intended to compensate for other things.

** A brief examination of the characteristics of several of the industries in the area shows this assumption to be realistic.

*** A conservative assumption in light of the peak characteristics of these wholesale customers.

**** Including the cost of money adjustment.

***** Including the cost of money adjustment.

enough to support petitioners investment to serve their customers.

The differential is even more striking if 95% of the customer's demand is assumed to fall on peak. The cost for the same customer with 80% load factor would be $48,837 * or $425 more than the power could be sold for; and with a 60% load factor would be $43,222 ** or $238 more than the power could be sold for. If we consider a 15 megawatt customer, AP&L's purpose in filing these new rates becomes even more apparent. A 15 megawatt customer with 80% load factor can purchase from AP&L under the P-3 rate schedule for $69,218; with 60% load factor for $61,226. Even if we assume only 90% of that load is on peak, the purchased power costs alone under the proposed U-3 rate would be $71,-174.70 and $62,750.70, respectively, including cost of money adjustment. Under the present U-3 rate, a U-3 customer could purchase power for such a customer for $64,143 and $56,151 respectively.

In other words, for this desirable type of customer, for which petitioner would otherwise compete, what would otherwise have been a $5075 per month margin between the cost of purchased power and the amount for which it could be sold would be turned into $1956.70 (80% load factor) loss before consideration of return or expenses. For the 60% load factor customer, the $5075 per month margin would be turned into a $1063 loss before consideration of return or expenses.

Since the old U-3 and P-3 rates have had essentially the same load blocks (see Attachment A) and charge blocks, with the U-3 rate being cheaper for the first 8,000 kilowatts of load by $2,000 per month and the rates otherwise being essentially identical, there should be some explanation of why AP&L sees fit to change its comparative rate structure by filing only to increase

* Including cost of money adjustment at the average rate envisioned for the twelve months beginning August, 1973 in AP&L's filing.

** Including cost of money adjustment.

the rate of its competitors, which have historically been somewhat lower than its retail industrial rates.

The unexplained differentials and change in the historic relationship between wholesale and retail industrial rates shown above would, in itself, be cause for rejection, even if no more were shown. But the lack of cost basis to the filing may also be shown, even though the company seems to have gone out of its way to pick a stale, non-representative test year. Yet further, the company proposes here to alter the terms and conditions of its rates so as to impose an extremely onerous double recovery upon its wholesale customers; and to utilize automatically a tax adjustment clause that it long ago was told by this Commission it could not utilize without filing for a rate change when the clause was intended to operate * and to impose a cost of money escalation clause for which there is no more justification shown than an escalator clause tied to the results of the sixth race at Hialeah or any other game of chance.

V

Although one would imagine that AP&L must, by May 31, 1973, have had the figures as to its 1972 calendar year results available, the company has filed a split test year, ending on July 31, 1972. Ordinarily, of course, one would expect that any organization dealing regularly with this Commission would be sensitive to the frequently expressed concern that the figures upon which rates are based be as up-to-date as possible, *cf.* Docket R-463. The validity of the Commission's concern with recent data is demonstrated by the fact that, according to AP&L's billing data, as compared with the test year revenues shown in Statement N, the revenues from the municipal customers which AP&L has utilized for the test year were $7,929,648 while in the succeeding twelve months the like figure would be $10,405,301, and the same figures for the cooperatively owned customers were $501,838 and $702,835. The use of the split test year here adopted has several advantages

* The company has not bothered to advise the Commission of its earlier attempts in this regard.

to the company, however. For one thing, since it takes in the period comprising phase one of the President's economic stabilization program, it understates revenues to be ordinarily expected to the extent that the fuel clause would have risen to collect more revenues than it did under the freeze. To this extent, a revenue "deficiency" is created by the artful use of the test period. More important, however, the use of a split year of this sort makes the filing virtually impossible for the customers or the staff seriously to analyze prior to the time this Commission must act with respect to suspension, since the Forms 1 and 12 cannot be utilized as a check to ascertain what the company has done. This Commission has only recently required a utility which filed its proposed rate increase on April 10, 1973 (and thus may have had some justification for so doing) on the basis of an earlier test year to refile a new cost of service based on 1972 data. Order of June 14, 1973, *Gulf States Utilities Co.*, Docket No. E-8121. Inasmuch as there is no excuse here for the old test year, except to mislead and confuse this Commission and the customers, the use of this artificial test year is additional grounds for rejection here, and direction to the company to refile with a 1972 test year if it believes it can support a rate increase thereby.

VI

Although the company has so structured its test year so as to make comparison with Forms 1 and 12 difficult or impossible and its testimony so as carefully not to explain certain critical factors, certain of the factors utilized by the company in the construction of its cost of service are, at the very least, questionable, and the effect of the questionable factors upon the cost of service can be quantified now, without the substantial effort and discovery that many of the other factors may take to quantify. Thus, for example, the company has utilized a single peak allocation for its basic demand allocator, see Statements M, page 17 of 27, which appears basically (but not correctly) to be developed from the single coincident peak of the customers at the time of the company's peak load. The com-

pany justifies this on the basis of Mr. Homard's testimony (pp. 5-7) as to the relative importance of the company's summer and winter territorial loads. The difficulty with this analysis, even if it were otherwise valid, which it probably would not be for AP&L, is that AP&L is a member of the South Central Electric Companies group, which has a seasonal exchange with TVA, the net effect of which is dratistically to cut down the generation which AP&L must install to meet its summer peak, and to provide a ready market for substantial capacity during the winter trough of AP&L's territorial load. While it is unclear whether the company has correctly reflected the benefits of the seasonal exchange (or whether its integrated contract with the Middle South system is either operating fairly to AP&L's customers or correctly reflected), it certainly is clear that AP&L itself is not a proper candidate for a single peak allocation on the basis it argues.

If the actual territorial peaks are taken from AP&L's Form 12's for the respective months,* to develop the correct demand allocator on the basis of twelve months average peaks, and the remainder of AP&L's allocation factors are corrected to insert the new twelve month average peak allocation above,** the rate base allocated to municipals (Statement N, page 1 of 2) changes from $32,775,-789 to $28,194,948, and that for the cooperative group from $2,717,005 to $1,793,795. Moreover, because of the consequent change in each of the operating expenses other than "fuel and purchased power" resulting from the use of AP&L's allocation methods (save for the twelve month demand) the operating income *at present rates* allocated to municipals in Statement N (page 1 of 2) changes from $1,225,561 as shown by AP&L to $1,488,532, while the

* Although AP&L does set forth the coincident peaks of its wholesale customers, as required, in its filing Statements M, page 16 of 27, it does not give the total company peaks in the filing.

** Many of AP&L's other allocations are based, at least in part, upon its basic demand allocator. These have simply had the new, 12 month, demand allocator inserted in lieu of the single peak demand allocator.

like change for the cooperative group is from $(3,959) to $45,682.

The energy allocation is also faulty, but is more difficult accurately to quantify in the short time available to petitioners. For example, Statements M, pp. 9, 17, and 24 of 27 develop the figures for the energy allocator to the wholesale customers based upon certain assignments and assumptions as to the energy wheeled during diversity exchange and to certain customers. If these assignments and assumptions are reversed, and the allocations are made upon a more typical basis of book dollars and book megawatt hours, the energy allocators to the customers would drop substantially, and the net effect on Statement N would be beneficial to the customers. Specifically, the Statement N figures as to operating income would be increased, at *present rates*, for the cities by $147,953, and for the cooperative group by $11,635.

VII

The *pro forma* nuclear adjustment made by AP&L is entirely without merit. In the first place, of course, what AP&L proposes is an adjustment to put, however crudely, its nuclear plant in the rate base while continuing to book interest during construction, since it does not anticipate putting the nuclear plant into service prior to spring, 1974. See testimony of Mr. Ritchie, page 8. Thus, if not rejected or suspended for the maximum five month period, the company will earn on the basis of costs and expenses it has never incurred for a substantial period, even if the on-line date now estimated is met. In the second place, as a result of the operation of the Middle South system, the method of proration used by the company (Statement L, pp. 3, 4 of 4) is almost certainly severely inaccurate. Aside from the fact that the revenue deduction shown on line 4, page 3 of 4 is over-stated by some $300,000 because of the company's use of 2.8 mills in the fuel clause base (footnote 4) rather than the 2.862 mills in the actual base (see existing and filed rates U-3, B-1) there is little or no chance that a nuclear plant would be operated to produce the same kilowatt hours as 850 mega-

watts of fossil generation taken evenly across the company's fossil generation mix, because it, like all other generation on the system, would be operated to provide power most efficiently for the Middle South system as a whole.

Moreover, there is no reason to assume that (1) the unit will be down for refueling nine months after it begins operation (Statement L, page 404) or that (2) it will ordinarily operate at only 600 megawatts of its 850 megawatt capacity when it runs (*ibid*). For each of these reasons, and both of them, the nuclear *pro forma* adjustment proposal should be rejected out of hand.

VIII

Perhaps most important, AP&L is apparently seeking, by sleight of hand, to use this Commission to its own end of completing a cycle by which it turns a valuable concession, given during arms' length negotiations in return for a result immensely valuable to AP&L and its shareholders, into a mess of pottage. Over the years, petitioners, and others, have from time to time built generation of their own, and discussed alternative bulk power supply among themselves and with others. These discussions reached a head in the mid-1960's, and in a series of negotiations with AP&L, petitioners, individually, hammered out long-term supply contracts with AP&L. Petitioners, in these contracts, agreed not to purchase such capacity from others and to limit plant credit to existing capacity of their own; AP&L, in return for these immensely valuable concessions, has agreed to seek 10% less from the petitioners than it would otherwise be entitled to.* Until now, AP&L has stuck by its agreement. With the present filing, now that all the petitioners are tied by the long-term contracts for which AP&L guaranteed a discount, however, AP&L seeks a fair rate of return based

* The discount arragenment for the cooperative group is similar, but differently phrased. The Conway Corporation is presently operating on a 5% direct discount and an additional 5% is being escrowed by AP&L, apparently without passing through its income accounts. See Form 1, page 225.

upon a deficiency apparently calculated on the basis of its book *net* income, after discount. The effect of this is to eliminate the benefit petitioners get from the discount, since the rate, *after* discount, will beset at what the Commission finds to be fair and reasonable, if AP&L's method is followed. Thus the rate for those systems without a long-term contract, if any, would be substantially in excess of a fair and reasonable rate. If AP&L can pull this cloak over the Commission's eyes and obtain from petitioners the precise same rate after discount that it would have gotten if petitioners had not signed the long-term full requirements contract, then this Commission will truly have traded petitioners' birthright, see *Gulf States Utilities Co.* v. *FPC*, US —, 41 USLW 4637 (1973) for a mess of pottage.

Obviously, since AP&L and petitioners have agreed on the value of the long-term feature of the contract to AP&L's shareholders, the discount should be given effect as it is set forth in the contract. Thus, the book revenues which AP&L utilizes in its Statement N (line 2) should be corrected, since all AP&L is entitled to is a fair return on its undiscounted rate. Thus the revenues of $7,929,648 and $501,838 which AP&L shows for the cities and cooperative group, respectively, should be corrected to the pre-discount revenues of $8,810,720 and $557,597, respectively.* After adjustment for tax effect, this would mean an addition to net earnings (Statement N, line 16) of $430,638 for the cities and $27,255 for the cooperative group *under present rates.*

IX

The Company here attempts to introduce a cost of money escalation clause into its rates. There is no attempt whatever to justify or even to rationalize the clause; while the Company has filed a Statement O (which does not meet the filing requirements of Section 35.13 of the Commission's Rules and Regulations) there is nothing which

* For convenience, the 10% figure is used for the cooperative group also, as being approximately correct. The exact figure varies with the customer's load factor.

purports to relate the cost of money escalation clause to anything more than wishful thinking.

The Company also proposes to apply to the Cities (but not to the Cooperative group) a tax adjustment clause, which it apparently expects to operate automatically. It fails to note that by letter of September 12, 1965, sent by direction of this Commission, the Secretary advised AP&L that:

> It is noted that in addition to providing a presently effective schedule of rates and charges, rate schedule supplements for service to municipal and private utilities as designated in the Attachment provide for future adjustment in billing due to changes in taxes and the Gross Receipts Tax of the State of Arkansas. The invocation of these adjustments will constitute a change in rates within the meaning of Section 205(b) of the Federal Power Act and Sections 35.1(c) and 35.13 of the Commission's Regulations thereunder and therefore shall be preceded by appropriate supplemental schedule filings.

No less should be required today. These escalation clauses plainly do not meet the justification for escalation factors set out in this Commission's Opinion 633, *New England Power Company*, — FPC — (Docket No. E-7541, October 30, 1972), and thus should be rejected altogether, but in any event, they should not be allowed to operate automatically.

X

AP&L proposes an "additional facilities charge" in it's proposed rate schedule whereby it proposes to charge wholesale customers, for the installation of any additional transmission or distribution facilities (other than transformation or substation facilities), a charge of 1.3% of the original installed cost of such additional facilities per month. Several of the petitioners expect to be in need of such facilities in the near future, as the result of growing loads. Since 1.3% per month is equal to 15.6% per year, this means that in 6.41 years, a wholesale customer would pay to AP&L the extra cost of new transmission or distribution lines to serve it, just in the "additional facilities charge".* Of course, since the facilities would be required to serve growing loads, the customer would also have paid AP&L the whole cost of service for all such facilities in the basic rate. Thus AP&L seeks to recover from the petitioners twice for all future line extensions. This approach is unfair on its face, and it further indicates that AP&L intends to attempt to squeeze petitioners out of competition.

XI

The Company, by this filing, has increased its ratchet from 70% to 75%. This is totally unjustified on the basis of the filing, and imposes a substantial burden upon petitioners for several months of each year. Moreover, since the Company utilizes a 70% ratchet for its industrial load, it is a further device utilized to institute a price squeeze.

XII

An officer of a sister member of the Middle South system once aptly testified, as to analogous matters, that "the exact cost will probably never be known because the disbursements are so well scattered throughout the records until I doubt it would be possible to get them all together and thus ascertain the true cost . . ." Testimony of J.D. Stietenroth, Hearings Before a Subcommittee of the Committee of the Judiciary, United States Senate, 83rd Congress, 2nd Session, Investigation Concerning the Charges of Monopolistic Influences in the Power Industry, Part II, September 28, 1954. Petitioners, in the 27 days since the filing of this schedule, has not been able to determine the dollar effect of numerous items which appear to warrant investigation. These include, but are limited to:

(a) The mode of operation of the Middle South system, and its fairness to the customers of AP&L as reflected through AP&L's books.

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* $500,000 in new facilities to serve increased load would require a payment of $78,000 per year under this clause alone.

(b) The correct reflection of savings from the seasonal diversity exchanges in which AP&L engages.
(c) The transactions with the Southwest Power Administration, from which AP&L appears to get power which should belong or be allocated to petitioners.
(d) The propriety of the rate design

XIII

The revenues which AP&L is utilizing to determine its "deficiency" are not only not corrected to eliminate the effect of the long-term discount, but are also not corrected to reflect plant credit correctly. AP&L has determined that it will pay petitioners *not* to run their existing generation, through the plant credit rider. As can be seen from the billing comparisons, this credit to petitioners amounts to $221,123 per year. Since AP&L, as a part of its contractual relations with petitioners, has sought to induce them not to run their generation by the use of this clause, for its own benefit, it is plainly improper to calculate the "deficiency" in such a fashion as to charge them directly the same amount paid out for this purpose. When corrected for tax effect, this factor will increase the Statement N operating income for the cities by $108,085.

XIV

As we have shown, there are substantial irregularities in the AP&L filing, and that filing should be rejected as a result of the obvious price squeeze which AP&L has sought to impose without cost basis therefore. As can be seen from Attachment B, hereto, Middle South Utilities, AP&L's corporate parent, has increased its consolidated net income by 24% in the twelve months ended May 31, 1973 over the previous twelve months. Consequently, it is apparent that a rejection with directions to AP&L to justify a rate increase on the basis of a more recent test year, if it can do so on a more normal basis, would scarcely injure either AP&L or Middle

South and its shareholders. If relevant, however, it should also be pointed out that making but three of the corrections here discussed—for the twelve month average peak demand allocation and gross rather than net billings for purposes of the revenue estimates (correcting both for long-term discounts and for plant credit) would completely wipe out the company's justification for a rate increase, without consideration of the numerous other factors herein discussed. If these corrections *alone* are made, then the existing rate of return for both cities and cooperatively owned systems is shown to be well in excess (7.19% and 4.06% respectively) of that which the company claims to want as a result of this filing (6.415% and 3.002%; see Statement G) and the rate *now* returns 10.29% on equity. If the proposed rates, rather than the present rates, are utilized in the calculation, the overall rate of return which would be shown would be 10.30% for the cities and 8.83% for the cooperatively owned group, for an overall rate of return from all wholesale business of 10.21%. Based on the company's Statement G, and Doctor Langum's testimony as to embedded debt costs and ratios, this would equate to a return on equity for the city business of 21.26%, for the cooperative business of 16.19%, and for the overall wholesale business of 20.65%. Heretofore, to the knowledge of the undersigned, no electric public utility has yet had the gall to even request such a rate from this Commission.

CONCLUSION

For the above stated reasons, and since the company has filed a plainly discriminatory rate against the single class of customer which it has historically attempted to drive out of business, without justification on any ordinary cost of service basis, the filing should be rejected out of hand, with leave for the company to file again a) if and when it files to increase its retail industrial rates, and b) if and when it can justify an increase to the wholesale customers on a single year recent "test year". Without waiving any rights under the foregoing motion,

petitioners should be admitted as full parties to this case in any event, and if the motion to reject is not granted, then the rate should be suspended for the maximum five month period envisioned by the Federal Power Act and consonant with the President's economic stabilization program.

Respectfully submitted,

/s/ Robert C. McDiarmid
ROBERT C. MCDIARMID
Attorney for the Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas

June 28, 1973

Law Offices of:

Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

VERIFICATION

DISTRICT OF COLUMBIA, ss:

Robert C. McDiarmid, first being duly placed upon affirmation, deposes and says that he is an attorney for the Conway Corporation. Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas; and that as such he has signed the foregoing Protest, Motion to Reject, and Petition to Intervene of Publically Owned Wholesale Customers for and on behalf of said parties; that he is authorized by the Cities and Cooperatives so to do; that he has read said Protest and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information or belief.

/s/ Robert C. McDiarmid
ROBERT C. MCDIARMID

Subscribed and affirmed to before me this 28th day of June, 1973.

/s/ [Illegible]
Notary Public

My Commission expires September 30, 1974.

ATTACHMENT A

ARKANSAS POWER & LIGHT COMPANY

ELECTRIC RATE SCHEDULE

Issued by O. V. Holeman, Director of Rates & Research

ARKANSAS PUBLIC SERVICE COMMISSION

Received: July 9, 1965

Approved: July 9, 1965

Authority: Docket No. U-1901

LARGE POWER SERVICE RATE SCHEDULE P3

Effective July 9, 1965—Page 1 of 2

Supersedes Schedule No. 14-A, Effective 3-18-63
Superseded by Schedule No. ——— Effective ———

AVAILABILITY

At a point on existing facilities having adequate capacity and suitable voltage for delivery of service from the Company's interconnected transmission system.

APPLICATION

To all electric service, including incidental lighting, required by Customer on the premises, when supplied at one point of delivery and measured through one kilowatt hour meter.

Applicable to standby or supplementary service and to interruptible service only in conjunction with the applicable Rider for such service.

Not applicable to temporary, breakdown, resale or shared service.

CHARACTER OF SERVICE

Three phase, 60 cycles and at one standard delivery voltage required by Customer and available at Customer's service location.

NET MONTHLY RATE

$3,085.00 for the first 1,100 Kw or less of Load
$2.35 per Kw for the next 6,900 Kw of Load
$1.60 per Kw for all additional Kw of Load
0.495c per Kwh for the first 360 Kwh per Kw of Load
0.370c per Kwh for all additional Kwh

Minimum

The Load Charge for the current month, but not less than $3,085.00 monthly.

Adjustments

1. Taxes. The above rate shall be subject to an increase or decrease in proportion to the amount of new taxes or increased taxes which the Company may hereafter have to pay, which are levied or imposed, or increased, or decreased by laws or ordinances which are not in effect on July 1, 1965, provided, however, that this Adjustment shall only be applied when authorized by order of the Arkansas Public Service Commission.

2. Fuel. The above energy charge(s) will be increased or decreased one-thousandth (.001) mill per Kwh for each one-thousandth (.001) mill per Kwh by which the weighted average cost of fuel, adjusted for losses, burned in the Company's fossil fuel burning generating stations during the second preceding calendar month for the supply of service hereunder exceeds or is less than the following amounts per Kwh delivered to Customer.

   (a) For delivery at nominal voltages of 13,800 or higher: 2.862 Mills
   (b) For delivery at nominal voltages of less than 13,800: 2.938 Mills

3. Customer may elect to take service at primary voltage that is available or, in Company's judgment, can be made available in the most practicable manner. When Customer contracts to take service at such primary voltage and provides all facilities necessary to take service at this Voltage, the Load Charge, before adjustments, will be reduced 15c per Kw for nominal delivery voltage of 13,800 or above.

The highest load established during the month, as shown by or computed from the readings of Company's demand meter, for the 15 minute period of Customer's greatest use during the month. Loads established during the billing months of October through May will be reduced by 50% of their excess over the average of the four loads billed during the preceding billing months of June, July, August and September, provided Customer received service during the preceding months of June, July, August and September. However, the billing load for any month shall not be less than 1,100 Kw nor less than 70% of the highest load billed during the 12 months ending with the current month.

If the power factor at the point of measurement is found to be less than 85%, load measurement may also be made by Kva demand meter, in which case one Kva as registered will be considered as 0.85 Kw but not less than the actual Kw.

PAYMENT

Bills are due and payable each month upon presentation.

CONTRACT PERIOD

Not less than five years.

SERVICE REGULATIONS

Service under this schedule is subject to the Service Regulations of the Company as they are now on file, and as they may in the future be filed, with the Arkansas Public Service Commission, State of Arkansas.

ATTACHMENT B

Ark. Gazette Sunday, June 24, 1973

UTILITIES SHOW 24 PER CENT INCOME GAIN

Consolidated net income of $85,799,000 was earned by the Middle South Utilities System during the 12 months ended May 31, an increase of 24 per cent over the $68,-969,000 earned during the 12 months ended May 31, 1972, the system said Saturday.

Earnings per share on average number of shares outstanding amounted to $2.09 compared with $1.73 during the previous period, on a smaller number of shares outstanding.

For the five months ended May 1973, the System's consolidated net income was $27,035,000, compared with $21,007,000 during the same period of 1972. Earnings per share for the period were 64 cents, as compared with 52 cents for the same period in 1972.

Total operating revenues for the 12 months ended May 31 were $624,373,000, up 16.8 per cent from a year earlier. Electric operating revenues during this period increased 16.5 per cent to $575,566,000.

Middle South's major companies are Arkansas Power and Light Company, Arkansas-Missouri Power Company, Louisiana Power and Light Company, Mississippi Power and Light Company and New Orleans Public Service, Inc.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. E-8250

ARKANSAS POWER & LIGHT COMPANY

RESPONSE OF ARKANSAS POWER & LIGHT COMPANY TO MOTION OF PUBLICALLY OWNED WHOLESALE CUSTOMERS

Comes now Arkansas Power & Light Company (AP&L) in opposition to the "Protest, Motion to Reject and Petition to Intervene of Publically Owned Wholesale Customers" (Customers), filed June 28, 1973, as supplemented by "Motion for Leave to Substitute and Add," filed July 2, 1973, in the above-referenced case. In support of its opposition, AP&L states as follows:

1. On June 1, 1973, AP&L filed with the Commission in the above docket an Application for Increase in Electric Rates applicable to its various municipal and rural electric cooperative customers. This application was opposed by nine of the Company's wholesale customers by the Customers' June 28, 1973 motion, as supplemented by their July 2 "Motion for Leave to Substitute and Add."

2. Customers' motion to reject is without merit. Section 35.5 of the Commission's Regulations under the Federal Power Act specifically states that a filing is to be rejected if it "patently fails to substantially comply" with applicable requirements. Customers' motion does not in any way show that the Company's filing fails to substantially comply with the Commission's requirements.

3. The issues raised by the Customers in their motion are not grounds for a motion to reject. Even if the mathematical calculations which Customers assert should have been made are correct—a point which the Company strongly denies—the issues raised merely indicate the appropriateness of a hearing so that all parties will have an opportunity to support their positions.

4. The very essence of a hearing in proceedings of this type is to determine the justness and reasonableness of the proposed rates. The Company has supported the rates it is proposing by filing detailed Statements A through P, as required by § 35.13 of the Commission's regulations, and presenting the testimony of six witnesses on its behalf. Customers, on the other hand, through their counsel have done no more than make a series of completely unsubstantiated charges that totally lack supporting data. If the Customers believe that the issues they raise have merit, they should file testimony and exhibits substantiating their claims. Once they have done so, the Company will be able to respond through the submission of rebuttal evidence. Pending the submission of Customers' testimony and exhibits, AP&L will attempt here to briefly discuss some of the contentions made by Customers in their motions and will show that Customers' assertions are greatly exaggerated or without foundation. The Company does not admit that there is any validity to any issues raised by Customers which are not discussed below and will respond more fully to Customers' assertions at the proper time after Customers have filed their supporting testimony and exhibits.

5. Customers state (Motion, p. 3) that "[a]ccording to AP&L's Statement N, the increase proposed to reach these rates is 22.6% for the cities and 34.9% for the cooperatives." This statement is typical of the way in which Customers have attempted to misconstrue AP&L's filing. During the year beginning August 1973, the Company would receive $11,809,323.23 from its wholesale customers under its presently effective rates. This figure, not the $8,431,486 test year revenues, must be used to determine the percentage increases under the proposed rates for the year beginning August 1973. Thus, the percentage increase to the municipal customers is 19.4% and that to the cooperatives is 27.2%, not the inflated figures cited by Customers.

6. Customers' assertions that the Company is attempting to "squeeze them out of competition" (Motion, p. 4) through the proposed rates and that Customers will be

unable to competitively sell power to industrial loads (Motion, p. 6) are completely fallacious and most vigorously denied by AP&L.

The Company will prove at the hearing, assuming that the issue is appropriately raised and supported on the record by material beyond undocumented allegations of Customers' counsel, that Customers will be able under the proposed rates to purchase power from the Company to serve any industrial customer with a realistic load factor that they may reasonably expect to attract, construct the necessary facilities at today's prices, and realize a return on their investment.

Customers' example of prospective industrial customers of 10 megawatts with 80% and 60% load factors and a 15 megawatt customer with an 80% load factor are likewise grossly inaccurate. Despite the fact that the municipal customers have been paying an extremely favorable rate for service from AP&L, not one of them has now, or ever has had, a customer with a 10 or 15 megawatt load.

7. The Company's use of a test period ending July 31, 1972, is not a basis for rejecting the Company's filing, nor was the use thereof designed in any way to confuse the parties to this proceeding. The Commission has accepted filings employing a mid-year test period in other proceedings, *e.g.*, *Duke Power Company*, Docket No. E-7994. In several recent proceedings, the Commission has accepted the company's filing and has then required it to file a cost of service presentation using a different test period. *Gulf States Utilities*, Docket No. E-8121; *Toledo Edison Company*, Docket No. E-7929; *Florida Power & Light Company*, Docket No. E-8008; *South Carolina Electric & Gas Company*, Docket No. E-8052. The Commission did not reject any of the cited filings, and it should not reject AP&L's filing because of the test year employed. Further, the use of a more recent test period in this proceeding will simply show an even lower rate of return to the Company under the present rates due to additions to plant, increased expenses, and higher peak demands and energy consumptions.

Customers' further assertion that the Company's test year is advantageous to AP&L since it understates revenues from the fuel clause due to Phase I of the President's economic stabilization program (Motion, p. 10) is erroneous. Phase I affected billing under the Company's fuel adjustment clause only during the month of September, 1971.

8. The Company's use of the peak responsibility method for allocating demand is completely proper, despite Customers' allegations to the contrary (Motion, p. 12), as the Company will establish at the hearing, assuming that the issue is appropriately raised and supported on the record by material beyond undocumented allegations by Customers' counsel.

9. AP&L denies that its *pro forma* nuclear adjustment is "without merit" (Motion, p. 14). The Company's Arkansas Nuclear One unit will be in service during the first twelve months after the proposed effective date of this rate increase. The adjustments made by the Company were designed to show the different costs that the Company can reasonably expect to incur by the use of this nuclear unit and are fully supported in AP&L's filing.

10. Customers state that "AP&L, in return for these immensely valuable concessions, has agreed to seek 10% less from the petitioners than it would otherwise be entitled to" (Motion, p. 17). The contracts between AP&L and these customers allow the customers to receive up to a 10% discount from the rate in effect at the time the contracts were executed. These discounts, which vary according to the duration of the contracts, were derived in recognition of the fact that the facilities installed by the Company to serve the Customers would be idled while still having a substantial useful life remaining if the contracts are terminated early. Customers' loads are growing and long-range planning is necessary for both Customers and AP&L in planning the necessary facilities for serving these loads. Further, Customers' Motion ignores the fact that the contracts with certain of the Customers allow them to cancel the contracts in advance of the expiration of their 20-year term, particularly if the rates and charges are increased.

11. At page 19 of their Motion, Customers discuss the Company's proposed cost of money adjustment clause and the proposed tax adjustment clause. It is interesting to note that, although Customers argue against the cost of money adjustment, nowhere do they urge that the proposed adjustment is excessive. Indeed, it is a legitimate cost of service, for when the cost of money increases so does the cost of service.

The Company's proposed tax adjustment clause does apply to the municipal customers and not to the cooperative customers, as Customers state (Motion, p. 19). What Customers fail to state is the fact that the municipalities have the power to tax, whereas the cooperatives do not. Any tax that the municipalities may levy on the Company's operations or facilities used to serve the needs of that municipality increases the cost of service and should be passed on to the particular city levying the tax and should not be borne by other customers.

12. Customers allege that the proposed facilities charge would mean that the customer will pay AP&L the extra cost of the new facilities in 6.41 years (Motion, p. 20). This allegation totally ignores the fact that when the Company installs additional facilities, it incurs a variety of additional expenses, *e.g.*, additional *ad valorem* taxes, interest on bonds and preferred stock dividends, and additional operation and maintenance expenses connected with the new facilities. Customers also ignore the fact that they have the option of installing the new facilities themselves if they so choose.

13. In comparing the existing 70% ratchet to the Company's proposed 75% ratchet (Motion, p. 21), Customers fail to state that the existing Rate Schedule P3 is based on a 15-minute demand, while the proposed Rate Schedule U3 is based on a 60-minute simultaneous demand.

14. Customers assert that AP&L has paid them not to run their existing generation, through the use of the Plant Credit Rider (Motion, p. 23). The contracts entered into between AP&L and Customers do not prohibit Customers from operating their existing generation. Two of the customers (Conway Corporation and The City of

Benton, Arkansas) do operate their own generation. The Plant Rider Credit was designed to let Customers operate their generating equipment during the peak load season. Operation in this manner would reduce the billing demand to the customer during the months when the generation was operated and minimized the effect of the ratchet in existing Rate Schedule U3. The customers can shut down their generation during the light load season, and the Company would sell more off-peak energy to these customers.

15. The Company recognizes that Customers have a substantial interest in this proceeding and does not oppose their intervention herein.

16. As shown in AP&L's filing of June 1, 1973, the Company is only earning a rate of return of 3.739% from service to its municipally-owned and privately-owned wholesale customers. The Company is experiencing a negative rate of return of .146% from service to its rural electric cooperative wholesale customers. These extremely low rates of return demonstrate the Company's need for the rate increase proposed herein. The Commission has discretion over suspension of filed rate increases. *Municipal Light Boards of Reading and Wakefield, Mass* v. *FPC*, 450 F.2d 1341 (1971). AP&L urges that given the low rates of return it is currently experiencing from its wholesale classes of service, a one day suspension is fully justified. Customers will be fully protected by the rates being in effect subject to refund. However, if the rates are suspended for five months, as proposed by Customers, the Company will have to permanently forego those revenues that its filing shows are needed and justified.

WHEREFORE, for the foregoing reasons, AP&L respectfully submits that the Customers' motion to reject be denied as being without merit.

Respectfully submitted,

ARKANSAS POWER & LIGHT COMPANY

By /s/ Robert T. Hall, III
HARRY A. POTH, JR.
ROBERT T. HALL, III
REID & PRIEST
1701 K Street, N. W.
Washington, D. C. 20006

Attorneys for
Arkansas Power & Light Company

Edward B. Dillon, Jr.
Robert M. McHenry, Jr.
House, Holmes & Jewell
Tower Building
Little Rock, Arkansas 72201

VERIFICATION

DISTRICT OF COLUMBIA) ss:

Robert T. Hall, III being first duly sworn, deposes and says that he is attorney for Arkansas Power & Light Company; that he has been duly authorized to execute, verify and file with the Federal Power Commission the foregoing document; that he has read the contents of same and that the statements contained therein are true and correct to his best information, knowledge and belief.

/s/ Robert T. Hall, III
ROBERT T. HALL, III

Subscribed and sworn to before me this 20th day of July, 1973.

/s/ Lee S. Sherline
LEE S. SHERLINE
Notary Public

My Commission Expires Nov. 14, 1973

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of § 1.17 of the Rules of Practice and Procedure.

Dated at Washington, D.C. this 23rd day of July, 1973.

/s/ Robert T. Hall, III
ROBERT T. HALL, III

Of Counsel For
Arkansas Power & Light Company

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

ARKANSAS POWER AND LIGHT COMPANY

Docket Nos. E-8250
E-8071
E-8142

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF SHEETS, DENYING MOTION TO REJECT, CONSOLIDATING PROCEEDINGS, ESTABLISHING HEARING PROCEDURES, INITIATING PROCEEDING UNDER SECTION 206 OF THE FEDERAL POWER ACT, AND PERMITTING INTERVENTION

(Issued July 31, 1973)

On June 1, 1973, Arkansas Power and Light Company (APLC) tendered for filing proposed changes in its Rate Schedule U3—Resale Service to Municipally Owned and Privately Owned Electrical Distribution Systems [1] and its proposed changes would increase APLC's revenues from sales and service by $1,969,462 for the twelve month period ending July 31, 1972. The proposed effective date is August 1, 1973. (FPC Rate Designations are shown in Appendix A)

APLC states that no facilities will be installed or modified except to accommodate additional capacity and/or to

[1] Benton Municipal Light and Water Works, Water and Light Commission of Hope, City of North Little Rock Arkansas, City of Osceola, Arkansas, City of Prescott, Arkansas, City of West Memphis, Arkansas, Citizens Light & Power.

[2] Conway Corporation, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative Inc., North Arkansas Electric Cooperative.

provide points of delivery for customers' load growth in the future. Furthermore, APLC states that the Company does not propose to apply the 1.3% monthly additional facilities charge provided for in the new rate schedules to any presently installed transmission and distribution facilities. Finally, APLC states that the rate of return from service to the municipally owned and privately owned systems is 3.74% and from service to rural electric cooperatives the rate of return is a negative .15%.

The Company states that the proposed rates will enable the Company to improve its rate of return, which it believes is vital to attract the necessary amount of capital in order to provide adequate service to its present and future customers.

Notice of filing was issued on June 15, 1973, with protests and petitions to intervene due on or before June 28, 1973. A Protest, Motion to Reject, and Petitions to Intervene of Publicly Owned Wholesale Customers [1] (Customers) was timely filed June 28, 1973. In support of its motion to reject, Customers first allege that APLC's participates in anti-competitive activity and that the proposed rate increase would "squeeze" Customers out of competition with respect to sales to industrial customers.

By order issued May 31, 1973, in *Indiana and Michigan Electric Company* Docket No. E-7740 we set minimum standards for those who would raise anti-competitive issues. These standards are that the petition to intervene must clearly specify 1) the facts relied upon, 2) the anti-competitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct. Our review of Customers' petition to reject or intervene indicates that it fails to specify the relief which is within this Commission's authority to direct. Accordingly, we shall limit Customers' participation in this proceeding to matters other than the alleged anti-competitive activities. This action is without prejudice to Customers' right

[1] Conway Corporation, Benton Municipal Light & Water Works, Hope Water & Light Commission, City of North Little Rock, Arkansas, City of Osceola, Arkansas, City of Prescott, Arkansas, City of West Memphis, Arkansas, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative, Inc.

to file an appropriate amended petition which sets forth relief for the alleged anti-competitive conduct that is within this Commission's authority to direct.

Customers also allege several other grounds in support of its motion to reject. Firstly, Customers argue that by filing a split test year ending July 31, 1973, APLC has effectively understated its revenues. Secondly, Customers argue that certain factors utilized by APLC in construction of its cost of service are questionable; e.g., the utilization of a single peak allocation for its basis demand allocation. Thirdly, Customers argue that allowance of the nuclear adjustment clause would put the nuclear plant in its rate base while continuing to book interest during construction, since it does not anticipate putting the nuclear plant into operation prior to Spring, 1974. Fourthly, the Customers argue that the introduction of an embedded debt cost adjustment provision and a tax adjustment clause should be rejected as not meeting the justification for escalation factors set for in Commission's Opinion 633, *New England Power Company* (Docket No. E-7541) and if not rejected, should not be allowed to operate automatically. Fifthly, the Customers state that allowance of APLC's "additional facilities charge" would allow APLC to recover twice for all future line extension-recovery once by the "additional facilities charge" and secondly, recovery would be had in the increase cost of service.

In the event that the filing is not rejected, Customers urge the Commission to suspend the proposed rate schedule changes for the full five month statutory period provided for in Section 205(e) of the Federal Power Act, set the matter for hearing and request permission to intervene in these proceedings. Customers' motion to reject raises substantive issues which cannot be summarily decided and require an evidentiary hearing which we have set forth herein.

On review of APLC's June 1, 1973, filing at Docket No. E-8250 and Customers' motion to reject or in the alternative suspend the filing indicates that the proposed rates have not been shown to be just and reasonable and may be unjust, unreasonable, preferential or unduly discriminatory or otherwise unlawful and may require a full evidentiary hearing.

On March 8, 1973, APLC tendered for filing in Docket No. E-8071, an initial Power Service Agreement between the City Water and Light Plant of the City of Jonesboro, Arkansas (Jonesboro) and APLC to become effective June 1, 1973.

APLC described the Agreement as lasting for a term of at least seven years, beginning on or about June 1, 1973, and providing for an initial block of at least 5,000 KW during the term of the Agreement. Jonesboro is not now served by APLC and there is no interconnection between their respective systems. APLC states that the city electrical system has need of additional firm capacity and energy to supplement its own generation and other sources of firm power supply in order to adequately supply the city's customers. APLC further states that the rates and charges provided for in the Agreement were arrived at through negotiations with Jonesboro, and they are designed to produce a return approximately equal to the Company's overall rate of return.

The Agreement provides that the demand charge shall be increased by one cent ($.01) per KW of Contract Demand for each full one tenth of one percent (0.1%) increase in the Company's embedded cost of long-term debt above the 5.87% existing as of July 31, 1972. Furthermore, the energy charge will be increased or decreased to reflect the nearest one-thousandth (.001) mill per kilowatt-hour, the change in the cost of fuel utilized in Company-owned generating stations.

APLC's filing in Docket No. E-8071 was noticed on March 22, 1973 with motions of protest or intervention due on or before April 12, 1973. No motions to protest or intervene were received.

APLC's March 8, 1973, filing at Docket No. E-8071 became effective June 1, 1973. Our review indicates that the rates have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful. Therefore, we shall institute an investigation under Section 206 of the Federal Power Act to determine the justness and reasonableness of those rates.

We note that in a related case in Docket No. E-8142, the Commission in an order issued July 3, 1973, instituted an investigation under Section 206 of the Federal Power Act with respect to an embedded debt cost adjustment provision contained in the Power Coordination, Interchange and Transmission Agreement dated April 20, 1972 between APLC and Arkansas Electric Cooperative Corporation. Since the adjustment clause in Docket No. E-8142 is identical to the provision in Docket No. E-8250 and Docket No. E-8071, common issues of law and fact are raised. We will accordingly order consolidation of these dockets. Consistent with this action, we will amend our order of July 3, 1973, in Docket No. E-8142 to provide dates for service of evidence and hearing consistent with our action herein.

The Commission finds:

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates and charges contained in APLC's Rate Schedules as proposed in Docket No. E-8250 filed May 31, 1973.

(2) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Federal Power Act that the Commission enter upon a hearing under Section 206 of the Federal Power Act to determine the justness and reasonableness of the Initial Power Service Agreement in Docket No. E-8071 filed March 8, 1973.

(3) The disposition of this proceeding, should be expedited in accordance with the procedures set below.

(4) In the event this proceeding is not concluded prior to the termination of the suspension period herein ordered in Docket No. E-8250 the placing of the rate and charges applied for in this proceeding into effect, subject to refund with interest, while pending Commission determination as to their justness and reasonableness, is consistent with the purpose of the Economic Stabilization Act of 1970, as amended.

(5) Good cause exists for consolidation of Docket Nos. E-8250, E-8142, and E-8071.

(6) Consistent with our action consolidating Docket Nos. E-8250, E-8071 and E-8142, the procedural dates set forth in our July 3, 1973, order in the latter docket should be amended as hereinafter ordered.

(7) The petition to intervene of Customers should be granted as hereinafter ordered.

(8) The petition to reject in Docket No. E-8250 should be denied.

The Commission orders:

(A) The above enumerated rate schedules in Docket No. E-8250 filed May 31, 1973, are accepted for filing and their effectiveness is suspended until January 1, 1974.

(B) APLC is required in Docket No. E-8250 and in E-8071 to file within 60 days of the issuance of this order an updated cost of service for the twelve month test period ending June 30, 1973 (in accordance with Regulations 35.13 and 35.12 respectively).

(C) APLC's March 8, 1973 filing at Docket No. E-8071 constituting an initial Power Service Agreement with Jonesboro is hereby accepted for filing to become effective June 1, 1973 as requested.

(D) An investigation into the justness and reasonableness of the initial Power Service Agreement with Jonesboro at Docket No. E-8071 is hereby instituted under Section 206 of the Federal Power Act.

(E) Docket Nos. E-8250, E-8142 and E-8071 are hereby consolidated and set for hearing in accordance with the schedule established in ordering paragraph (F) hereof.

(F) Pursuant to the authority of the Federal Power Act, including Sections 205, 206, 308, and 309 thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, a public hearing shall be held commencing with a pre-hearing conference on February 5, 1974, at 10:00 A.M., EDT in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20424, concerning the lawfulness of the rate increase and adjustment clauses set forth above.

(G) On or before January 4, 1974, the Commission Staff shall serve its prepared testimony and exhibits. The prepared testimony and exhibits of any or all intervenors shall be served on or before January 15, 1974. Any rebuttal evidence by APLC shall be served on or before January 29, 1974. Cross-examination on the evidence filed will commence on February 12, 1974.

(H) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for the purpose (see Delegation of Authority, 13 C.F.R. 3.5(d)), shall preside at the hearing in this proceeding, and shall prescribe relevant procedural matters not herein provided, and shall control the proceeding in accordance with the policies expressed in the Commission's Rules of Practice and Procedure.

(I) The above-named petitioners are hereby permitted to intervene in this proceeding, subject to the rules and regulations of the Commission: *Provided, however*, that the participation of such intervenors shall be limited to matters affecting rights and interests specifically set forth in the respective petitions to intervene, except Customer's participation is limited to matters other than the alleged anti-competitive activities, and *Provided, further*, that the admission of such intervenors shall not be construed as recognition by the Commission that they, or any of them, might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(J) Customer's motion to reject in Docket No. E-8250 is denied.

(K) Nothing contained in this order shall relieve the Applicant of any responsibility imposed by the Economic Stabilization Act of 1970, (Public Gas 91-370, 84 Stat. 799, as amended by Public Law 92-15, 85 Stat. 38), or by any Executive Order or rules and regulations promulgated pursuant to such Act.

(L) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission:

[SEAL]

MARY B. KIDD,
Acting Secretary.

ATTACHMENT
1 of 3

Designations and Descriptions
Arkansas Power and Light

Dated:

Filed: June 1, 1973

Effective:

FPC Designation	Customer	Description
Supplement No. 5 to Rate Schedule FPC No. 45 (Supersedes Supplement No. 2 to Rate Schedule FPC No. 45)	Farmers Electric Cooperative Corporation	Rate Schedule B1
Supplement No. 1 to Supplement No. 5 to Rate Schedule FPC No. 45	"	Service Regulation
Supplement No. 2 to Rate Schedule FPC No. 49	North Little Rock	Rate Schedule U3
Supplement No. 1 to Supplement No. 2 to Rate Schedule FPC No. 49	"	Service Regulation
Supplement No. 1 to Rate Schedule FPC No. 50	Hope	Rate Schedule U3
Supplement No. 1 to Supplement No. 1 to Rate Schedule FPC No. 50	"	Service Regulation

ATTACHMENT
2 of 3

Supplement No. 1 to Rate Schedule FPC No. 51	Citizens Light & Power Company	Rate Schedule U3
Supplement No. 3 to Rate Schedule FPC No. 55	West Memphis	Rate Schedule U3
Supplement No. 1 to Supplement No. 3 to Rate Schedule FPC No. 55	"	Service Regulation

FPC Designation	Customer	Description
Supplement 1 to Rate Schedule FPC No. 56	Prescott	Rate Schedule U3
Supplement No. 1 to Supplement No. 1 to Rate Schedule FPC No. 56	"	Service Regulation
Supplement No. 3 to Rate Schedule FPC No. 57	Conway Corporation	Rate Schedule
Supplement No. 1 to Supplement No. 3 to Rate Schedule FPC No. 57	"	Service Regulation
Supplement No. 2 to Rate Schedule FPC No. 60	Benton	Rate Schedule
Supplement No. 1 to Rate Schedule FPC No. 62	North Arkansas Electric Corporation	Rate Schedule B1

ATTACHMENT
3 of 3

Supplement No. 4 to Rate Schedule FPC No. 63 (Supersedes Supplement No. 1 to Rate Schedule FPC No. 63)	Osceola	Rate Schedule U3
Supplement No. 1 to Supplement No. 4 to Rate Schedule FPC No. 63	"	Service Regulation
Supplement No. 4 to	Mississippi County Electric Cooperative, Inc.	Rate Schedule
Rate Schedule FPC No. 65		B1
Supplement No. 1 to Supplement No. 4 to Rate Schedule FPC No. 65		Service Regulation

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. E-8250, et al.

ARKANSAS POWER AND LIGHT COMPANY

AMENDED PETITION OF PUBLICLY OWNED WHOLESALE CUSTOMERS

By order of July 31, 1973, this Commission suspended the proposed tariff increase of Arkansas Power and Light Company ("AP&L") in Docket E-8250, and admitted the undersigned publicly owned wholesale customers as parties to this proceeding. At page two of its order, this Commission stated:

> "By order issued May 31, 1973, in *Indiana and Michigan Electric Company* Docket No. E-7740 we set minimum standards for those who would raise anti-competitive issues. These standards are that the petition to intervene must clearly specify 1) the facts relied upon, 2) the anti-competitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct. Our review of Customers' petition to reject or intervene indicates that it fails to specify the relief which is within this Commission's authority to direct. Accordingly, we shall limit Customers' participation in this proceeding to matters other than the alleged anti-competitive activities. This action is without prejudice to Customers' right to file an appropriate amended petition which sets forth relief for the alleged anti-competitive conduct that is within this Commission's authority to direct."

We understand this language to mean that the Commission accepts 1) the specification of "facts relied upon" in the original Petition, 2) the specification of "the anti-competitive practices challenged" relied upon in the original Petition, but requests the petitioners to specify more clearly "3) the requested relief which is within this Com-

mission's authority to direct." In response to that portion of the Commission's order, the publicly owned wholesale customers hereby amend their petition to clarify their request that the Commission reduce the rate sought by AP&L to eliminate the price squeeze as follows:

1. Petitioners incorporate by reference in its entirety their Protest, Motion to Reject, and Petition to Intervene of Publicly Owned Wholesale Customers.

2. As Petitioners have demonstrated, this rate increase filing appears to be an attempt to institute a "price squeeze" to the end of putting Petitioners out of business as independent members of the electric power industry. In addition, as we have shown, the rate at which AP&L proposes to charge Petitioners is unduly discriminatory vis-a-vis the Company's retail industrial rates, which have historically been on a basis similarly structured, but somewhat higher than the wholesale for resale rates of AP&L. As this Commission properly advised the Supreme Court in *Gulf States Utilities Company* v. *FPC, et al.*, No. 71-1178, in its brief in that proceeding at page 13-14, "allegations of anticompetitive conduct would be properly raised and fully considered by the Commission in proceedings . . . to review rates under Sections 205 and 206. . . ." and, as the Supreme Court pointed out in its opinion, U.S. —, at pages 10-11 of the slip opinion,

> "Title II certainly did not preclude the operation of the anti-trust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. . . . This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to . . . directives contained in §§ 205, 206. . . . The Act did not render anti-trust policy irrelevant to the Commission's regulation of the electric power industry."

Whatever else the language may mean, there can be no question that it directs this Commission to eliminate rate structures which are anticompetitive by reason of a price squeeze.

In these circumstances, and without waiving any other relief heretofore sought, Petitioners request this Commission to reduce the proposed rates filed by AP&L to eliminate the anti-competitive price squeeze, within its authority under Sections 205 and 206.

Respectfully submitted,

/s/ Robert C. McDiarmid
ROBERT C. MCDIARMID
Attorney for the Conway Corporation, Benton Municipal Light & Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corp. and Mississippi County Electric Cooperative, Inc., Arkansas

August 22, 1973

Law Offices of:

Spiegel & McDiarmid
2600 Virginia Ave., NW
Washington, D.C. 20037

VERIFICATION

DISTRICT OF COLUMBIA, ss:

Robert C. McDiarmid, first being duly placed upon affirmation, deposes and says that he is an attorney for Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas; and that as such he has signed the foregoing Amended Petition of Publicly Owned Wholesale Customers for and on behalf of said parties; that he is authorized by the Cities and Cooperatives so to do; that he has read said Amended Petition and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information or belief.

/s/ Robert C. McDiarmid
ROBERT C. MCDIARMID

Subscribed and affirmed to before me this 22nd day of August, 1973.

/s/ Nancy S. Bartman
Notary Public

My Commission expires September 30, 1974.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Rush Moody, Jr., and
William L. Springer.

Docket Nos. E-8250
E-8142
E-8071

ARKANSAS POWER AND LIGHT COMPANY

ORDER AMENDING PRIOR ORDER

(Issued August 29, 1973)

On August 7, 1973, Arkansas Power and Light Company (APLC) filed a Motion for Clarification of the Commission's Order of July 3, 1973, in Docket No. E-8142 and of July 31, 1973, in the above-captioned consolidated dockets.

In its motion APLC states that in Ordering Paragraph (C) of the Commission's Order Accepting Proposed Rate Increase for Filing and Instituting Investigation of Debt Adjustment Provision Under Section 206 of the Federal Power Act, issued July 3, 1973, in Docket No. E-8142, the Commission directed APLC to file its prepared testimony and exhibits in that docket by September 4, 1973. In its Order of July 31, 1973, the Commission consolidated Docket No. E-8142 with Docket Nos. E-8250 and E-8071 and stated in Finding Paragraph (6) the procedural dates in the July 3, 1973, Order "should be amended as hereinafter ordered." In Ordering Paragraph (B) of the July 31, 1973, Order, the Commission required APLC to file an updated cost of service in Docket Nos. E-8250 and E-8071 within 60 days of the issuance of the order. In its motion of August 2, 1973, APLC asks whether the service of evidence by Company and Staff in Docket No. E-8142 will be the same schedule as established in Docket Nos. E-8071 and

E-8250 and therefore, APLC's direct evidence in Docket No. E-8142 would be due at the same time as its updated cost of service is to be filed.

As hereinafter stated, the Commission finds that APLC's direct evidence in Docket No. E-8142 should be filed on October 1, 1973, the same due date for its updated cost of service in Docket Nos. E-8250 and E-8071.

The Commission finds:

Good cause exists to amend the Commission Order of July 31, 1973, to provide for APLC's direct evidence in Docket No. E-8142 to be served on October 1, 1973.

The Commission orders:

(A) The Commission Order of July 31, 1973, is hereinafter amended to provide for APLC's service of direct evidence on October 1, 1973, in Docket No. E-8142.

(B) Staff's evidence in Docket Nos. E-8250 and E-8071 shall be served in accordance with the procedural dates set forth in the order of July 31, 1973. Staff's evidence in Docket No. E-8142 shall be served on January 4, 1974.

(C) APLC's motion for clarification is hereby granted.

(D) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket Nos. E-8250, E-8071, E-8142

ARKANSAS POWER & LIGHT COMPANY

RESPONSE OF ARKANSAS POWER & LIGHT COMPANY TO AMENDED PETITION OF PUBLICALLY OWNED WHOLESALE CUSTOMERS

Comes now Arkansas Power & Light Company (AP&L or Company), in accordance with Section 1.8(e) of the Commission's Rules of Practice and Procedure, for the purpose of responding to the "Amended Petition of Publically Owned Wholesale Customers," dated August 22, 1973, and filed in the above-referenced consolidated dockets. In support hereof, AP&L states:

1. By Order issued July 31, 1973, in the above-referenced dockets, the Commission, *inter alia*, accepted for filing and suspended until January 1, 1974 AP&L's proposed Rate Schedules U3 and B1, set the matter for hearing and permitted the intervention of certain of the Company's publically owned wholesale customers * (Customers). With regard to that intervention, the Commission stated:

> "By order issued May 31, 1973, in *Indiana and Michigan Electric Company* Docket No. E-7740 we set minimum standards for those who would raise anti-competitive issues. These standards are that the petition to intervene must clearly specify 1) the facts relied upon, 2) the anti-competitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct. Our review

* Conway Corporation, Benton Municipal Light & Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

of Customers' petition to reject or intervene indicates that it fails to specify the relief which is within this Commission's authority to direct. Accordingly, we shall limit Customers' participation in this proceeding to matters other than the alleged anti-competitive activities. This action is without prejudice to Customers' right to file an appropriate amended petition which sets forth relief for the alleged anti-competitive conduct that is within this Commission's authority to direct." (July 31 Order, p. 2)

2. On August 22, 1973, Customers filed an amended petition to intervene, wherein they stated:

> "We understand this language to mean that the Commission accepts 1) the specification of 'facts relied upon' in the original Petition, 2) the specification of 'the anti-competitive practices challenged' relied upon in the original Petition, but requests the petitioners to specify more clearly '3) the requested relief which is within this Commission's authority to direct.'" (Amended petition, pp. 1-2)

Customers then go on to request that the Commission "reduce the proposed rates filed by AP&L to eliminate the anti-competitive price squeeze, within its authority under Sections 205 and 206." (Amended petition, p. 3)

3. AP&L asserts that Customers have misinterpreted the Commission's July 31, 1973 Order in that the Commission could not have accepted the "specification of facts relied upon" in Customers' petition to intervene, since Customers did not state any facts in their original or amended petitions to intervene. Rather, they merely pleaded conclusions, such as "this rate increase filing appears to be an attempt to institute a 'price squeeze' to the end of putting Petitioners out of business as independent members of the electric power industry." (Amended petition, p. 2)

3. Customers' allegations of a "price squeeze" are totally unsupported by any facts or evidence. Since the Company knows of no anti-competitive practices in which

it has engaged, it is unable to respond to Customers' baseless conclusions with respect to a "price squeeze."

4. The Company therefore respectfully requests this Commission to treat Customers' allegations as a complaint under Section 306 of the Federal Power Act and require them to conform to the requirements of Section 1.6(b) of the Commission's Rules of Practice and Procedure with regard thereto. To wit, the complaint is required to contain "a statement of the facts forming the basis for the conclusion that there has been a violation of an act administered by this Commission or of a rule, regulation, or order issued by the Commission."

When Customers have filed such a complaint, containing *facts*, not merely conclusions, and have presented any documents which they believe support those facts, the Company will be in a position to rebut Customers' contentions.

5. AP&L asserts most emphatically that it has not engaged in any anti-competitive practices of any nature, and it is confident that the Customers will not be able to present any facts regarding such practices.

WHEREFORE, for the foregoing reasons, AP&L respectfully requests that the Commission dismiss the Amended Petition or, in the alternative, direct Customers to file, if they so desire, a complaint conforming to Section 1.6 of the Commission's Rules of Practice and Procedure.

Respectfully submitted,

ARKANSAS POWER & LIGHT COMPANY

By /s/ Robert T. Hall, III
HARRY A. POTH, JR.
ROBERT T. HALL, III
Reid & Priest
1701 K Street, N.W.
Washington, D.C. 20006

September 6, 1973

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

WHOLESALE ELECTRIC RATES—
Denial of Rehearing

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr.,
Rush Moody, Jr., and
William L. Springer.

Docket Nos. E-8250, E-8071, E-8142

ARKANSAS POWER AND LIGHT COMPANY

ORDER DENYING AMENDED PETITION TO INTERVENE AND CLARIFYING PRIOR ORDER

(Issued October 29, 1973)

On July 31, 1973, we issued an order in this proceeding which granted a certain petition to intervene [1] filed June 28, 1973, with the condition that the participation of the intervenors would be limited to matters other than the anti-competitive activities alleged. Relying on our decision in *Indiana and Michigan Electric Company* (I&M) order, Docket No. E-7740 issued on May 31, 1973, we found that said petition failed to specify the relief which was within the Commission's authority to grant. We permitted petitioner, however, the right to file an amended petition which would set forth the relief for the alleged anti-competitive conduct that is within this Commission's authority to grant.

On August 22, 1973, petitioners filed an amended petition reciting arguments and statements similar to those made in its initial petition to intervene. Specifically,

[1] Parties included in the joint petition are as follows: Conway Corporation, Benton Municipal Light and Water Works, Hope Water and Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

petitioners alleged that APLC's proposed rates is unduly discriminatory vis-a-vis the Company's retail industrial rates. The specific relief petitioners seek in the context of the proceeding is "that the Commission reduce the rate sought by APLC to eliminate the price squeeze . . ."

The relief sought by Peitioners is beyond the authority granted to us under the Federal Power Act. Under the Federal Power Act this Commission is charged with the responsibility for reviewing rate applications to insure that the rates proposed are just and reasonable. APLC has submitted its full evidentiary presentation including a cost of service as well as testimony and exhibits of their witnesses which they state support the subject wholesale rate increase. That evidence, including APLC's allocation of its costs to its wholesale service, is, of course, subject to review and cross-examination by all parties including the intervenors and is also of course subject to review and decision thereon by the Presiding Trial Judge assigned to the case as well as the Commission itself.

Wholesale rates must recover allocated wholesale costs. Customers' suggested relief is a rate related not to wholesale costs but rather related to APLC's industrial rates. However, APLC's industrial rate level and the accounting and rate making principles underlying that rate level is under the sole jurisdiction of the state commission and not the Federal Power Commission. We have no jurisdiction over APLC's industrial rates, and we do not choose to open this hearing to an examination of those rates. Such an action would require a detailed analysis of APLC's retail cost of service and would result in this Commission interjecting itself into an area in which it has no jurisdiction.

Petitioners' allegation of "price squeeze" in and of itself, does not constitute anticompetitive behavior by APLC given the fact that any wholesale rates we approve must be based on allocated wholesale costs. To approve rates which recover less than those costs would produce grave consequences, since such action would be tantamount to imposing confiscatory rates on APLC and possible subsidization of APLC's wholesale service by

APLC's industrial customers or other retail customers of APLC over whom we have no jurisdiction. Moreover, Petitioners' proposal would subordinate our authority to set wholesale rates to the retail ratemaking jurisdiction of the state commission.

Customers' amended petition cites language in *Gulf States Utilities Co.* v. *F.P.C.*, et al.,[2] which it asserts directs the Commission to eliminate rate structures which are anti-competitive by reason of a price squeeze. However, as we stated in our order in *Southern California Edison Company*, Docket No. E-8176, issued on September 21, 1973, the *Gulf States* opinion clearly states that its ruling is not to be interpreted as saying that the Commission must always hold a hearing on the antitrust issue.[3] The Supreme Court also noted without objection, that the Court of Appeals had observed that the summary disposition of the anti-trust argument in a proceeding might be acceptable provided such disposition does not go unexplained.[4]

Finally, petitioners state that they interpret the Commission's order of July 31, 1973, to mean that the Commission "accepts (1) the specification of 'facts relied upon' in the original Petition, and (2) the specification of the 'anti-competitive practices challenged' relied upon in the original Petition . . ." The facts relied upon by petitioners do not, in and of themselves, prove the validity of the matters asserted and if a full evidentiary hearing had been required on this issue, the facts relied upon would require further development.

The Commission finds:

(1) Based on our review of the filing by APLC, and the pleadings of the parties herein, we find that no anticompetitive issue has been presented which would require further development in this proceeding.

---

[2] *Gulf States Utilities Co.* v. *F.P.C., et al*, 411 U.S. 747 at p. 758 (1973).

[3] *Ibid* at p. 762.

[4] *Ibid* at p. 762.

(2) We find the relief sought by the petitioners to be beyond the scope of this Commission's jurisdiction, contrary to the purposes of the Federal Power Act and inappropriate in this proceeding, the purpose of which is to review the justness and reasonableness of APLC's proposed wholesale rates.

The Commission orders:

The amended petition, filed by Customers, is hereby denied.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

[Filed No. 5, 1973, 3:36 PM, Office of the Secretary, Federal Power Commission]

Docket Nos. E-8250, E-8071, E-8142

ARKANSAS POWER & LIGHT COMPANY

PETITION FOR REHEARING

By Order of October 29, 1973 "Denying Amended Petition to Intervene and Clarifying Prior Order", this Commission appears to have determined that it will refuse to consider an intentional, voluntary, and conscious effort of a wholesale supplier of electric energy to 1) charge wholesale customers whose rates are set by this Commission substantially more than is charged retail customers with similar characteristics whose rates the company has voluntarily refused even to seek to increase, in violation of the antidiscrimination provisions of Sections 205(b) and 206(a) of the Federal Power Act, and 2) alter its historic wholesale-retail price structure in such a way as to preclude its wholesale customers from competing for new retail industrial load of the sort which is and historically has been vigorously sought by both the company and petitioners,* in violation of the Sherman and Clayton Acts. The customers, pursuant to Section 313(a) of the Federal Power Act, herewith seek rehearing of that Order, which, if adhered to, may seriously prejudice the presentation of their case and the end result thereof.

Thus it appears that this Commission, established, *inter alia*, to protect the small wholesale customers against the overwhelming economic might of the supplying electric utilities, is in large measure abdicating

* Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

its responsibility in this area.* Worse yet, the effect of this abdication is, in many ways, to place the wholesale customers is a far less protected position than if the Commission had never been given jurisdiction over wholesale rates.

Ordinarily, of course, there would be no question that a decision by an ordinary manufacturing company to charge so much to its wholesale customers that they could not compete with it at retail for a class of desirable customers would be illegal as a "price squeeze" under the antitrust laws. *United States of America* v. *Aluminum Company of America*, 148 F 2d 416 (2nd Cir., 1945). Further, it has been held as long ago as 1900 that, at common law, a utility is required to charge like rates for like service, and can justify a differential in rates only to the extent the services and costs thereunder are in fact different. In *Western Union Telegraph Co.*, v. *Call Publishing Co.*, 181 U.S. 92 (1901), the Court held, at 99-100:

> No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. . . . But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great

* The Order of October 29, 1973, infers protection to the customers because of the fact that wholesale rates are based on allocated wholesale cost. Of course, in *Duke Power Company*, —— FPC ——, this Commission appears to have taken leave of any historic anchor to cost in setting rates, and the estimated test year procedure established in Order No. 487, Docket R-463, gives very little hope to the customers that there will be any real cost data available upon which to base a rate.

> as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling.

See also *Postal Cable Telegraph Co.* v. *Cumberland Telephone & Telegraph Co.*, 177 Fed. 726 (MD Tenn, 1910); *North Carolina Public Service Co.* v. *Southern Power Co.*, 282 Fed. 837 (4th Cir. 1922). Thus, at common law, the wholesale customers here could have required AP&L to cost-justify any unfavorable difference in rates between them and the supplier's own retail industrial customers which would prevent their competition.

The basic question then, is whether the passage of the Federal Power Act, which imposed FPC jurisdiction on electric wholesale rates, removed these protections for the consumer-owned systems. As we shall demonstrate, the passage of the Act plainly did not remove these protections, but was intended to add thereto, especially in the light of the characteristic dual customer-competitor relationship to which the undersigned systems are subject.

The Commission has recognized this problem in earlier years. For example, in Hearings Before The Committee On Commerce, United States Senate, 89th Congress, 1st Sess. on S. 218 (Serial No. 89-38, 1965) at page 68, the then Chairman of the Federal Power Commission testified:

> To the large privately-owned electric utility a retail customer, even a large industry, is simply a customer. However, a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a competitor in the fringe area where the two systems are contiguous, but may also be a direct or potential competitor for the commercial and industrial businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.

> The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipal systems succumb to purchase offers by investor-owned wholesale suppliers. In this respect wholesale rate regulation in the electric power industry is unique and faces far greater resistance by the privately-owned utilities than retail rate making. . . . The Nation values its pluralistic power economy and the role therein of the independent small-systems, public, cooperative, and investor owned. The necessity for Federal regulation to assure the survival of these small and medium-sized power systems is unmistakable.

The passage of Part II of the Federal Power Act plainly was not intended to override the protection which would otherwise be afforded by the antitrust laws. As the Supreme Court held in *Otter Tail Power Co.*, v. *US*, 410 US 366, 41 US LW 4292, 4295 (Feb. 22, 1973):

> There is nothing in the legislative history which reveals the purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.

Thus, it is clear that the illegality of a price squeeze of this nature continues to exist.

Moreover, it is clear that the Commission has the responsibility to deal with the issue of price squeeze under its rate regulation pursuant to Sections 205 and 206 of the Act. As the Supreme Court noted, in *Gulf States Utilities Co.*, v. *FPC*, 411 US 747, 41 US LW 4637, at 4640, 4641, May 14, 1973):

> The Act had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of selling and transmitting electric power in interstate commerce. . . . .

The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies. . . . .

In order to achieve Federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit. II was enacted. . . . Title II certainly did not preclude the operation of the antitrust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. See *Otter Tail Power Co.* v. *United States*, — U.S. — (1973); Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy 72 Col. L. Rev. 64 (1972). This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to . . . like directives contained in §§ 205, 206. . . . The Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry.

Moreover, the decision of the Supreme Court in *Gulf States supra*, is entirely consistent with the representation made to that Court by this Commission in its brief in that docket (brief for the Federal Power Commission in support of petitioner, Supreme Court Docket No. 71-1178). For example, at page 7 of that brief, this Commission represented that "in exercising its control over—rates, practices, and services of public utilities, the Commission has full authority to consider antitrust allegations and to prevent or remedy antitrust violations related to such matters." Further, this Commission, at page 13 of its brief, stated "allegations of anti-competitive conduct would be properly raised and fully considered by the Commission in proceedings—to review rates under Sections 205 and 206,—to review charges of unduly discriminatory rates or practices under Section 205—. Under each of these Sections the Commission has jurisdiction

to compel certain action by a public utility. If anticompetitive conduct or effects were established in such proceedings and were not outweighed by other factors which determine the public interest, the Commission could order a remedy directly related to the facts proven, e.g.,—order a change in rates, etc." And, at page 15, this Commission represented that "antitrust allegations can be relevant in proceedings—to approve—rates or practices of public utilities,—because monopolistic or discriminatory practices can be directly prevented or remedied in all these matters." See also, Commission brief at pages 12, 13, and 19. Thus, not only do the antitrust laws apply, outlawing the sort of price squeeze here alleged, but the Commission has correctly represented to the Court that it is required to enforce those laws in the course of its responsibilities under the Power Act.

Nor is there any serious question about the Commission's power to regulate wholesale rates by decreasing them to allow the wholesale customers fairly to compete with their suppliers for retail business. Section 205(b) of the Act reads:

> No public utility shall, with respect to any transmission or sales subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

This language would appear clearly to grant this Commission power to lower the wholesale rate subject to its jurisdiction in order to eliminate the unreasonable difference between classes of service here alleged.

If there were any question as to this Commission's ability so to act, it would have been resolved by the Supreme Court in its decision in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 646-47 (1945) interpreting the analagous section of the Natural Gas Act, Section 5(a), 15 U.S.C. 717d(a):

> The Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction. For Section 5(a), 15 U.S.C. 717d(a), provides that whenever the Commission 'shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential*, the Commission shall determine the just and reasonable rate.' (Italics added). It is clear that contracts covering direct industrial sales come within that italicized clause of Section 5(a).

This language does not appear susceptible of the interpretation placed upon that case in this Commission's order of November 2, 1973 in *Southern California Edison Co.*, Docket E-8176, at page 2.

There is here no suggestion that the retail rate in issue had been set in any way other than voluntarily by AP&L. Since there is apparently an intentional and substantial discrimination here, the rational apparently adopted by the Commission here would result in reopening, and indeed far expanding, the "Attleboro gap",* which Part II of the Act was passed completely to fill. *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 458 (1972). For if the Commission were correct, it would apparently remit wholesale customers to the state public service commissions to avoid the price squeeze by asking to have the lower industrial rate *raised*. Of course, there would be no reason why a state public service commission should ever act to raise a low industrial rate (which the state might well consider to be desirable for the purpose of attracting industry to the area).** We do not understand the view of the Commission that it has somehow, by non-use, lost its power to prevent discrimination. This is precisely the sort of "attractive gap" in regulation that the Supreme Court, in *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 20-22 (1961); and *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369-370 (1965) has determined Congress did not intend to leave in the passage of Part II of the Act.

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* Created by *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

** Arkansas, for example, seeks to attract industry, in part, on the basis of low retail electric rates.

This Commission has historically taken the position that charges under rates, even though set unlawfully high for illegal purposes, could not be recovered in private damage suits, treble damage or otherwise. See, e.g., this Commission's briefs to the Supreme Court in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 US 346 (1951).* If this Commission is really stating, as appears to be the case, that it is removing any real remedy for the illegality charged, because it will continue to assert primary jurisdiction in any court proceedings brought to recover overcharges, but will itself refuse to consider illegal price squeezes of the sort alleged, then it ought plainly to say so, once and for all, so that the issue may be determined by the Courts or by Congress. We are unaware of any indication that Congress ever intended such a result.

In short, it is clear that the wholesale customers of AP&L would have been entitled to relief both under the antitrust laws and the common law applicable to utilities if their contentions as to the facts are correct; and it is clear as well that Congress, by the passage of Part II of the Act, intended to strengthen, rather than weaken, the protections of the wholesale customers against discrimination. The Commission's apparent abandonment of its duty to protect wholesale customers against discrimination would result in depriving these customers of protection they would have had prior to the passage of Part II, and is plainly in error.

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* We note that the Commission's argument in that case rested strongly upon an assumption that the ultimate consumers would not benefit from recovery. In the case of consumer owned systems, like the customers here, that would not be the case.

CONCLUSION

For the foregoing reasons, and for the reasons alleged in our pleadings to date, which are incorporated by reference herein,* the customers request this Commission to grant rehearing of its order of October 29, 1973; determine that the price squeeze issue is one over which this Commission has full jurisdiction; and direct the Presiding Administrative Law Judge to take such steps as may be necessary to eliminate the price squeeze as it may be shown to exist.

Respectfully submitted,

/s/ _____

ROBERT C. MCDIARMID

Attorney for the Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

November 5, 1973

Law Offices of:

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2600 Virginia Avenue, N.W.
Washington, D.C. 20037

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* Protest, Motion to Reject, etc., filed June 28, 1973, and corrected by motion of July 2, 1973, and Amended Petition filed August 22, 1973.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

WHOLESALE ELECTRIC RATES—Denial of Rehearing

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Docket Nos. E-8250
E-8142

ARKANSAS POWER AND LIGHT COMPANY

ORDER DENYING PETITION FOR REHEARING

(Issued December 5, 1973)

On November 5, 1973, a customer group [1] (Customers) of Arkansas Power and Light Company (APLC) filed a Petition For Rehearing of our order issued in this docket on October 29, 1973. In the October 29 order, we denied, *inter alia*, Customers' Amended Petition For Intervention and ruled that the antitrust allegations made by Customers therein would not be considered in the hearing ordered. Specifically, we found that no anticompetitive issue had been presented which required further development in an evidentiary hearing since the relief requested by Customers was ". . . beyond the scope of this Commission's jurisdiction, contrary to the purposes of the Federal Power Act and inappropriate in this proceeding, the purpose of which is to review the justness and reasonableness of APLC's proposed wholesale rates." [2]

Customers are in error in their allegation that our order is inconsistent with the Commission's position in the *Gulf*

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[1] Parties included in the petition are: Conway Corporation, Benton Municipal Light and Water Works, Hope Water and Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers' Electric Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

[2] *Arkansas Power and Light Company*, Docket Nos. E-8250, E-8071 and E-8142, Order issued October 29, 1973, page 4.

States case.[3] As indicated by Customers, we stated in *Gulf States* that a remedy might be provided for anticompetitive conduct in a rate case. However, the particular remedy sought by Customers in this proceeding is beyond the authority granted us by Section 205 and 206 of the Federal Power Act.

Customers refer us to the *Panhandle Eastern* case[4] which Customers maintain supports the proposition that the language of 205(b) of the Federal Power Act grants this Commission authority "to lower the wholesale rate subject to its jurisdiction in order to eliminate the unreasonable difference between classes of service here alleged." Customers also state that *Panhandle Eastern* is not susceptible to the interpretation placed upon that case by the Commission in an order issued November 2, 1973 in *Southern California Edison Co.*, Docket No. E-8176, at page 2.

We disagree with Customers' reading of the *Panhandle* case and reaffirm our interpretation as stated in our order issued November 2, 1973 in *Southern California*. As we stated in that order, "In *Panhandle Eastern*, the issue was the propriety of the Commission's determination of the proper allocation of costs to *Panhandle Eastern's* wholesale service." In ascertaining the costs associated with the wholesale service, this Commission was called upon to consider "what costs are fairly attributable to each business, wholesale and retail, and what the resultant rate for wholesale business should be."[5] As we indicated in our October 29, 1973 order in this docket, we fully intend to design wholesale rates which recover properly allocable wholesale costs. In the process of designing proper wholesale rates, we certainly will consider the cost responsibility of APLC's direct industrial service in determining cost properly allocable to APLC's wholesale service. This process of designing proper wholesale rates is, however, an entirely different matter from Customers' position that we must subordinate our jurisdiction to that of the state commissions by basing wholesale rates on retail rates.

[3] *Gulf States Utilities Co.*, v. *FPC*, 411 U.S. 747 (1973).

[4] *Panhandle Eastern Pipeline Co.*, v. *FPC*, 324 U.S. 635, 646-647 (1945).

[5] *Ibid.*, at 647.

We note that this Commission has not been reluctant to consider antitrust issues in rate cases in those instances where we have the statutory authority to provide relief. For instance, in *Carolina Power and Light Company*,[6] this Commission on its own motion instituted a proceeding under Section 206 of the Federal Power Act to investigate an Availability Clause in a wholesale rate tariff for sales to municipal customers with regard to the possible anticompetitive nature of such clauses.

Finally, we note that Customers' petition for rehearing seems to interpret our order of October 29, 1973 as barring all anticompetitive issues from consideration in this proceeding. While the Commission has denied the particular antitrust issues raised by Customers in this proceeding, this is not to say that antitrust issues which are the proper subject of this Commission's jurisdiction could not be considered if properly raised.

The Commission finds:

The Petition for Rehearing of Customers, filed November 5, 1973, raises no new facts or issues of law requiring a modification of our order issued in this docket on October 29, 1973.

The Commission orders:

The petition for Rehearing, filed by Customers on November 5, 1973, is hereby denied.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

[6] Docket No. E-7918, order issued on March 12, 1973.

SUPREME COURT OF THE UNITED STATES

No. 75-342

FEDERAL POWER COMMISSION,
Petitioner,

v.

CONWAY CORPORATION, ET AL.

ORDER ALLOWING CERTIORARI. Filed November 11, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-342

Federal Power Commission, *Petitioner*

v.

Conway Corporation, *Et al., Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for Conway Corporation, Et Al., In Opposition

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October, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-342

Federal Power Commission, *Petitioner*

v.

Conway Corporation, *Et al., Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for Conway Corporation, Et Al., In Opposition

OPINION BELOW

The opinion of the Court of Appeals (App. A, To Petition) is reported at 510 F.2d 1264. The orders of the Federal Power Commission from which review was sought (App. C, D and E, To the Petition) are reported at 50 FPC 289, 1293 and 1780.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1975. On the Commission's application, the Chief Justice has twice extended the time for filing a Petition for Writ of Certiorari, the second order extending the Commission's time "to and including September 1, 1975." The Commission

has invoked the jurisdiction of this Court under 28 U.S.C. 1254 (1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b). A Petition for a Writ of Certiorari was filed on September 2, 1975, one day beyond the last day provided for in the order of the Chief Justice.[1]

QUESTION PRESENTED[2]

Whether the court of appeals below correctly determined that the Federal Power Commission erred in its determination that it lacked the power, in ruling on a proposed rate increase to wholesale customers[3] with which the filing utility competed directly at retail, to remedy the anti-competitive impact created by the alleged intentional "price-squeeze" imposed when the utility raised its wholesale rates substantially above those which it charged at retail without making a retail filing.

STATEMENT

The Customers regard the statement set forth by the Commission in its Section 1 as providing an adequate description of the proceedings before the Commission for the purpose of determining whether to grant Certiorari. The Commission's statement of the holding of the court below in Part II of its statement, however, appears to be in error both in its mischaracterization of the words of the statute (see below) and in its

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[1]The Customers here have repeatedly urged expedition in the Commission's determination to apply or not to apply for Certiorari, since the FPC has, in the underlying rate case, and in other such cases, consistently refused to allow even discovery on the issue of the intentional price squeeze asserted below, pending determination of this Court.

[2]The Customers also note that the Petition appears to be out of time.

[3]The wholesale customers of Arkansas Power & Light Company include Conway Corporation, Conway, Arkansas, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

assertion that "the court recognized that the Commission could not approve a wholesale rate which failed to recover properly allocated wholesale costs." (Petition, p.5) The court below expressly found it unnecessary to reach the latter issue as may be noted at p.22A, the portion cited, of the Opinion as reprinted in the Appendix to the Petition.

ARGUMENT

1. It is clear and all parties appear to have agreed that in a non-regulated industry, a price-squeeze, such as that here alleged, by a vertically integrated supplier against a wholesale customer would be illegal, and, if proven, not only damages, but treble damages under the anti-trust laws would be recoverable. *United States* v. *Aluminum Co. of America*, 148 F2d 416(CA2, 1945). It also appears clear that if there were no regulatory body superimposed, no common law public utility employing the power of eminent domain to furnish its services could employ price discrimination between two similar types of service and the Customers discriminated against could recover at least simple damages. See *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U.S.92, 99-100(1901); *Postal Cable Telegraph Co.* v. *Cumberland Telephone and Telegraph Co.*, 177 Fed. 726(MD Tenn, 1910); *North Carolina Public Service Co.* v. *Southern Power Co.*, 282 Fed. 837(CA4, 1922); *Salisbury and Spencer Railway Co.* v. *SouthernPower Co.*, 101 S.E.593 (1919), 102 S.E.625(1920), 105 S.E.28(S.Ct.N.C. 1920). This Court's decision in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), however, adopting the position urged by the Federal Power Commission in that case, appears to hold that the FPC has primary jurisdiction to deal with questions of this nature under the Federal Power Act. If the FPC does not have jurisdiction to remedy such a "price squeeze," then it is not clear where such a remedy would lie.

The view of the court below that the FPC had jurisdiction to deal with the price-squeeze here alleged is directly consistent with the decision of this Court in *Gulf States Utilities Co.* v. *FPC*, 411 U.S.747 (1973). As this Court noted, at 758-759:

"The Act had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce . . . The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies . . . .

In order to achieve federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit. II was enacted . . . . Title II certainly did not preclude the operation of the antitrust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366(1973); Meeks, Concentration in the Electric Power Industry: The Impact of Anti-trust Policy, 72 Col. L. Rev. 64(1972). *This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anti-competitive effects of regulated aspects of interstate utility operations pursuant to . . . like directives contained in §§205,206.* . . . The Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry. [emphasis added].

Moreover, the language of this Court in this respect in *Gulf States*, *supra*, is entirely consistent with the representations in this regard made by the Commission in its brief to this Court in that Docket. For example, at p. 7 of that brief, the Commission represented that "in exercising its control over . . . rates, practices, and services of public utilities, the Commission has full authority to consider anti-trust allegations and to prevent or remedy anti-trust violations related to such matters." Indeed, at pp. 13-14 of its brief in *Gulf States*, the Commission stated:

"Allegations of anticompetitive conduct would be properly raised and fully considered by the Commission in proceedings . . . to review rates under Sections 205 and 206, . . . to review charges of unduly discriminatory rates or practices under Section 205. . . . Under each of these Sections the Commission has jurisdiction to compel certain action by a public utility. If anticompetitive conduct or effects were established in such proceedings and were not outweighed by other factors which determine the public interest, the Commission could order a remedy *directly related* to the facts proven, *e.g.*, . . . order a change in rates, etc."

See also Commission brief in *Gulf States* at pp. 12, 13, 15, and 19.

2. In light of the basic law, and the Opinion below, however, the Commission begins its Petition with the proposition that its institutional act, the Federal Power Act, at Section 205(b), 16 U.S.C. 824d(b) "prohibits discrimination between '*sales* subject to the jurisdiction of the Commission'" (Petition, p. 6) [emphasis added]. It then argues (Petition, pp. 6-7) that since the Commission may act to set only jurisdictional rates, the Court below was in error when it suggested that, if the Commission were correct, Congress could easily have provided that the FPC could prohibit the maintenance of unreasonable differences in rate only "between classes of service subject to the jurisdiction of the Commission," since "this language would be mere surplusage." Aside from the somewhat strained nature of the argument, its basic difficulty lies in the fact that the Commission has misquoted its own basic statute, and then relied upon the misquotation.

The statute (Section 205(b)) is set forth in pertinent part immediately below the Commission's misquotation on p. 6 of its Petition. Obviously, it would be a great deal more difficult to bend the language of the statute to the Commission's position if the Commission had not added a gratuitous, but very important, *s* to the word "sale" in the purported quote. See also the material appearing within quotation marks at p. 5, line 5 of the Petition. The statute, however, as correctly set forth by the Court of Appeals, below, at e.g., Appendix to the Petition at pp. 12, 13, etc. provides only that "no public utility shall, with respect to *any* transmission or *sale* subject to the jurisdiction of the Commission . . . maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." [emphasis

supplied]. Thus, the statute, as noted by the court of appeals, provides only that the Commission may act on rates jurisdictional with it, but prohibits discrimination by any filing utility against wholesale customers or between wholesale customers. If the Commission were correct, a utility with but a single wholesale customer could file a wholesale rate of 300% higher than a corresponding retail rate, and after suspension, a customer would have to pay that rate for, perhaps, the five years it has taken the Commission to decide one recently decided rate case.[4]

The Commission's choice of legislative history, even on its face, without regard to the fact that the testimony quoted was given in response to a somewhat different version of the bill than enacted, simply shows, as the court of appeals noted, that the general intent was to confine the Commission's actions to the wholesale rates over which it had jurisdiction, and not to give it power to increase or decrease retail rates, as to which jurisdiction was left with the State Commissions. Cf. the *Shrevesport* case, *Houston, East & West Texas Railway Co.* v. *The United States*, 234 U.S. 342 (1914). Thus, neither the statute nor the legislative history is consistent with the Commission's argument.

3. The second half of the Commission's argument relies upon an equally faulty hypothesis. Thus, the Commission argues that wholesale rates must recover allocated wholesale costs if they are to be set by the Commission. Petition, p. 9. This is nonsense on several counts. First, the Commission has, since the beginning of its exercise of its rate jurisdiction, held that where there is an allegation of discrimination "[f]or the purpose of relieving a discrimination we interpret the statute to mean that the reasonable wholesale rate for any class of customers be not higher than the lowest rate charged by vendor utility to any customer for the same class of service under the same or substantially similar conditions." *Otter Tail Power Co.* 2 FPC 134, at 149 (1940). The analysis set forth in that decision was correct then and remains correct today. See also *Gulf States*

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[4] *Municipal Light Boards of Reading & Wakefield, Massachusetts, et al.* v. *Boston Edison Company*, FPC Docket Nos. E-7400 et al. _____ FPC _____. Increased rate filed January 29, 1970, effective April 30, 1970, Opinion 729 issued May 13, 1975.

Utilities Co. 1 FPC 522(1938); *Wisconsin-Michigan Power Co.*, 31 FPC 1445(1964).

Second, the Commission has in the past expressly set jurisdictional rates under the Natural Gas Act to allow competition with non-jurisdictional gas and other fuel rates, recognizing that the jurisdictional rates may be set below what the Commission might otherwise consider to be just and reasonable. See, *e.g.*, *Florida Gas Transmission Co.*, 47 FPC 341, 366-367(1972). This Court has expressly recognized the appropriateness of considering non-jurisdictional rates in setting jurisdictional rates. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 646-67 (1945).

Third, the Commission appears to argue or infer that somehow or another the setting of an electric wholesale rate is a simple exercise in establishing costs and adding them up to come to a "single proper rate." Petition, pp. 10-11. That assertion is remarkable for its lack of understanding of the Commission's own function and practice. For example, in the last electric rate case fully decided by the Commission, the Presiding Law Judge disposed of the issues before him in an Opinion which took 188 pages. *Municipal Light Boards of Reading and Wakefield, Massachusetts* v. *Boston Edison Company*, FPC Docket No. E-7400 *et al.*, *supra*. If the setting of rates were as simple as inferred by the Commission in its Petition, it surely would not have taken the Commission five years to determine the merits of that case.

4. Finally, a further difficulty with the Commission's view is that if it were adopted, the Commission would find itself required to provide the same protection against discrimination under Part I of the Act which the court below has correctly held it to be obligated to provide under §§205 and 206. Part I applies generally to licensees of hydro-electric projects including AP&L. Section 20 of the Act, 16 U.S.C. 813, provides:

> "That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, non-discriminatory and just to the

> customer and all unreasonable discriminatory unjust rates or services are hereby prohibited and declared unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this Section within such State . . . jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this Section, to regulate and control so much of the services rendered and of the rates and charges of payment therefor as constitute interstate or foreign commerce. . . .

Section 19, 16 U.S.C. 812, further provides that, as a condition of hydro-electric license under Part I, if a state has not authorized and empowered a commission to regulate and control the services to be rendered by a licensee or the rates and charges of payments therefor, jurisdiction is conferred upon the Commission to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control. Since it is clear under *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964), as it was clear under the words of the statute, that no state can have jurisdiction to act against a price-squeeze by lowering a wholesale rate which discriminates against the wholesale customer, then by virtue of Sections 20 and 19, the Federal Power Commission is automatically granted the authority under Part I to eliminate the discrimination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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October, 1975

Supreme Court, U. S.
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No. 75-342

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-342

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) [1] is reported at 510 F. 2d 1264. The initial order of the Federal Power Commision (J.A. 34-42), order amending the prior order (J.A. 47-48), order denying amended petition to intervene (J.A. 52-55), and order denying rehearing (J.A. 65-67) are reported at 50 F.PC 289, 50 F.C. 584, 50 F.P.C. 1293 and 50 F.P.C. 1780, respectively.

[1] "Pet. App." references are to the appendix to the petition for certiorari filed by the Federal Power Commission in No. 75-342. "J.A." references are to the Joint Appendix in this proceeding.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1975 (Pet. App. 24a–25a). On June 27, the Chief Justice extended the time for filing a petition for a writ of certiorari to August 2, 1975. On August 1, the Chief Justice further extended the time for filing a petition for a writ of certiorari to September 1, 1975. The Court granted certiorari on November 11, 1975 (J.A. 68). The Court's jurisdiction rests upon 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S. 8251(b).

QUESTION PRESENTED

Whether the Federal Power Commission properly determined that it lacked authority, in determining whether an electric utility's wholesale rate increase was just and reasonable, to remedy alleged discrimination caused by the utility's retail rates, which are not subject to the Commission's jurisdiction?

STATUTES INVOLVED

Sections 201, 205 and 206 of the Federal Power Act, 16 U.S.C. 824, 824d, and 824e, are set forth in this brief's Appendix, *infra*, pp 44–49.

STATEMENT

This case involves an order of the Federal Power Commission (Commission or FPC), issued in the course of a wholesale electric rate proceeding, which limited the intervention therein of respondent Conway

Corporation, *et al.*[2] (Conway), to matters *other than* the alleged anticompetitive nature of the subject utility's nonjurisdictional retail rates. Upon review, the court of appeals held that the Commission is required to consider the alleged anticompetitive nature of such retail rates and when appropriate, order a reduction in wholesale rates on the basis thereof.

1. THE PROCEEDING BEFORE THE COMMISSION

Arkansas Power & Light Company (APLC) is a "public utility" engaged in "the sale of electric energy at wholesale in interstate commerce", as defined by Sections 201(b) and (e) of the Federal Power Act,[3] 16 U.S.C. 824(b) and (e). Accordingly, APLC's wholesale electric rates are subject to the Commission's authority to establish just and reasonable rates under Sections 205(a) and 206(a) of the Act. On June 1, 1973, APLC filed with the Commission a wholesale rate increase pursuant to Section 205(d) of the Federal Power Act, 16 U.S.C. 824d(d). Public notice of the filing was issued by the Commission on June 15, 1973.

In response to that notice, Conway, *et al.*, wholesale customers of APLC, protested the rate increase and

---

[2] The following wholesale customers of Arkansas Power & Light Company, respondents in this proceeding, are collectively referred to as "Conway":

Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative, Inc.

[3] Hereinafter referred to at times as "the Act".

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sought to intervene in the proceedings before the Commission (J.A. 4–25). Conway also alleged that the filing was made for anticompetitive purposes and stated as follows:

> Insofar as petitioners can ascertain, the sole reason which AP&L has for filing this unilateral rate increase is an attempt to squeeze petitioners or some of them out of competition, and to make them more susceptible to the persistent attempts of the company to take over the publically owned systems in the State. [J.A. 6]

Conway then made certain comparisons of APLC's retail industrial and wholesale rates and argued that the filing was the "result of the obvious price squeeze which AP&L [APLC] has sought to impose without cost basis therefore."[4]

On July 31, 1973, the Commission issued an order which accepted the tariff sheets for filing, suspended their effectiveness for five months and set the matter for hearing to determine the justness and reasonableness of the proposed rate (J.A. 34–42). Regarding respondent's allegations of anticompetitive price squeeze, the Commission noted that in its petition to intervene Conway had failed to specify the relief it sought "which is within this Commission's authority to direct", assuming that the allegations could be proven (J.A. 35). Accordingly, the Commission limited

[4] Like many large utilities, APLC makes sales of electricity both at wholesale for resale (subject to the Commission's jurisdiction) and at retail directly to industrial customers (not subject to the Commission's jurisdiction).

Conway's intervention to matters other than the allegations of anticompetitive conduct resulting from the price squeeze, but invited the respondents to file an amended petition setting forth relief "that is within the Commission's authority to direct" (J.A. 36).

Thereafter, Conway filed an amended petition wherein it urged the Commission "to reduce the proposed rates filed by AP&L to eliminate the anticompetitive price squeeze" (J.A. 45). By order dated October 29, 1973, the Commission concluded that the relief sought was beyond its power to grant (J.A. 53). As the Commission stated:

> The relief sought by Petitioners is beyond the authority granted to us under the Federal Power Act. Under the Federal Power Act this Commission is charged with the responsibility for reviewing rate applications to insure that the rates proposed are just and reasonable.
>
> * * *
>
> Wholesale rates must recover allocated wholesale costs. Customers' suggested relief is a rate related not to wholesale costs but rather related to APLC's industrial rates. However, APLC's industrial rate level and the accounting and rate making principles underlying that rate level is under the sole jurisdiction of the state commission and not the Federal Power Commission. We have no jurisdiction over APLC's industrial rates, and we do not choose to open this hearing to an examination of those rates. Such an action would require a detailed

> analysis of APLC's retail cost of service and would result in this Commission interjecting itself into an area in which it has no jurisdiction.

Since it could provide no remedy under the Federal Power Act, the Commission determined that it could properly dispose of Conway's objections "without a hearing and extended investigation." *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 762 (J.A. 54).

Conway applied for rehearing of the Commission's October 29, 1973 order (J.A. 56–64). That application was denied on December 5, 1973 (J.A. 65–67). Thereafter, respondents petitioned for review of the Commission's orders in the Court of Appeals for the District of Columbia Circuit.

2. THE COURT OF APPEALS DECISION

Upon review, the court of appeals rejected the Commission's analysis and remanded the case for further proceedings. The court acknowledged that the provisions of Sections 205(b) and 206(a) of the Federal Power Act, 16 U.S.C. 824d(b) and 824e(a) are by their terms limited to a "transmission or sale subject to the jurisdiction of the Commission" (Pet. App. 13a); that is, "the sale of electric energy *at wholesale*" [emphasis supplied], Section 201(b) of the Act, 16 U.S.C. 824(b). The court nevertheless held that the Commission has authority under those provisions to remedy "claims of discrimination between rates for two classes of service, only one of which is 'subject to the jurisdiction of the Commission' " (*Id.*).

While the court below accepted the proposition that the Commission could not order an increase in APLC's retail rates, which the court characterized as having been voluntarily "depress[ed] * * * in order to curb the retail competion of [APLC's] wholesale customers" (*Id.* at 22a–23a), the court nonetheless found that the Commission had authority to modify *the proposed wholesale rate,* if necessary, to relieve the alleged price squeeze (*Id.* at 20a–23a). The court of appeals recognized that the Commission could not approve a wholesale rate which failed to recover properly allocated wholesale costs (*Id.* at 22a). However, the court reasoned that the wholesale and retail rates may both "fall within a zone of reasonableness, yet create a price squeeze between themselves" (*Id.* at 22a). Accordingly, the court concluded that the Commission had authority to limit the wholesale rate to "the lower range of the zone of reasonableness and provide relief" (*Id.*).

SUMMARY OF ARGUMENT

A. The Federal Power Commission's regulatory authority under the Federal Power Act is limited to "the sale of electric energy at wholesale in interstate commerce." See Section 201(b) of the Act, 16 U.S.C. 824(b). As part of the Commission's responsibility to assure just and reasonable wholesale rates, it was empowered under Sections 205(b) and 206(a) of the Act, 16 U.S.C. 824(b) and 824e(a), to proscribe unduly discriminatory differences in such rates. However,

Congress carefully limited this remedial authority in that only with respect to a "transmission or sale subject to [its] jurisdiction" may the Commission adjudicate allegations of discriminatory differences in rates, 16 U.S.C. 824(b) and 824e(a). This legislative intent is manifest from the fact that the above-quoted phrase was inserted in both Sections 205(b) and 206 (a) of the Act, to make clear that the prohibitions contained therein apply only to the granting of undue preferences with respect to services otherwise subject to the Commission's jurisdiction. The prohibited preference must be referable to an improper wholesale rate, whereas the discrimination alleged in this case is the consequence of retail rates allegedly depressed for the purpose of curtailing retail competition. The latter is not subject to the Commission's jurisdiction, and the Commission viewed its authority as so limited in this case as it has at all times in the past.

The court of appeals declined to give the limiting words of Sections 205(b) and 206(a) of the Act their plain meaning. Instead the court held that discrimination caused by allegedly depressed retail rates is subject to the Commission's jurisdiction under those provisions (Pet. App. 22a–23a). While recognizing that the Commission has no authority to adjust retail rates in order to remove their discriminatory aspect, the court concluded that the Commission could reduce otherwise just and reasonable wholesale rates and thereby accomplish the same result. In reaching its conclusion

the court below erroneously relied on this Court's decision in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, for the proposition that the FPC may adjudicate allegations of discrimination in retail rates. On the contrary, in *Panhandle* the Court held that in setting rates for jurisdictional service the Commission must segregate the nonjurisdictional operations of a utility whose activities embrace both, and that the Commission has discretion in selecting the means for determining nonjurisdictional costs.

B. While the primary error underlying the court of appeals decision is its conclusion that the Commission may adjudicate claims of discrimination based on retail rates, in so doing it also incorrectly concluded that as a remedy for such discrimination the Commission can reduce wholesale rates to a lower point within the "zone of reasonableness" (Pet. App. 21a–22a). The Commission's responsibility under Section 205(a) of the Federal Power Act, 16 U.S.C. 824d(a), is to establish rates which enable the utility to provide adequate, reliable service at the least cost to the consumer while at the same time maintaining the utility's financial integrity. The court below ignored the fact that in fulfilling this duty the FPC does not establish a "zone" of possible rates and then select a single rate from that zone. On the contrary, the Commission's responsibility is to determine, based on the cost of wholesale service and with as much exactness as possible, the precise rate level appropriate in a given case. The Commission has no authority to reduce an

otherwise just and reasonable wholesale rate because of allegedly discriminatory nonjurisdictional retail rates.

C. Finally, the Commission's lack of authority to adjudicate claims of discrimination based upon retail rates will not leave respondents without a complete remedy. APLC's wholesale rates are regulated by the FPC, its retail rates by the Arkansas Public Service Commission, and the price squeeze alleged herein, which respondents argue is in violation of the antitrust laws, is cognizable in the federal courts.

ARGUMENT

THE FEDERAL POWER COMMISSION HAS NO AUTHORITY TO REMEDY AN ALLEGED DISCRIMINATION CAUSED BY A DEPRESSED NONJURISDICTIONAL RETAIL RATE.

A. THE LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION OF SECTIONS 205(B) AND 206(A) OF THE FEDERAL POWER ACT CLEARLY DEMONSTRATE THAT THE COMMISSION IS WITHOUT AUTHORITY TO RELIEVE AN ALLEGED RATE DISCRIMINATION CAUSED BY UNREGULATED NON-JURISDICTIONAL RETAIL RATES.

1. Under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, the Commission has authority to eliminate discrimination between sales which are subject to its jurisdiction. However, the Commission has no authority under the Act to remedy a claim of discrimination between a jurisdictional wholesale rate and a nonjurisdictional retail industrial rate.

Section 201(b) of the Federal Power Act limits the jurisdiction of the Commission to "the *sale of electric energy at wholesale* in interstate commerce," [emphasis supplied] 16 U.S.C. 824(b). Accordingly, Section 205(b), 16 U.S.C. 824(b), prohibits discrimination "with respect to *any transmission or sale subject to the jurisdiction* of the Commission" [emphasis supplied]. That section provides, in part:

> No public utility shall, *with respect to any transmission or sale subject to the jurisdiction of the Commission* * * * maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or classes of service [emphasis supplied].

The policy of Section 205(b) is enforced under the accompanying provisions of Section 206(a), 16 U.S.C. 824e(a), which reads:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility *for any transmission or sale subject to the jurisdiction of the Commission,* or that any rule, regulation, practice, or contract affecting such rate, charge or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order [emphasis supplied].

The claim of discrimination at issue here is caused by allegedly depressed retail rates (Pet. App. 22a–23a). However, it should be carefully noted that the italicized language in both Sections 205(b) and 206

(a) modifies all that follows it and the Commission's authority to remedy the prohibited conduct is thereby limited to situations where it is caused by a wholesale rate otherwise subject to the Commission's jurisdiction. The Commission so viewed its authority in the present case (J.A. 53), and the Commission has always viewed its authority as limited in this manner.[5] While not controlling, this reasonable, consistent and longstanding interpretation by the agency charged with administration of the Federal Power Act is entitled to considerable weight. *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 719.[6]

Nevertheless, the court of appeals declined to give the words of the statute their plain meaning, arguing instead that if Congress had wanted to limit the Commission's authority to the consideration of discrimination among rates which are the subject of the Commission's jurisdiction, it would have prohibited the maintenance of unreasonable differences in rates "between classes of service subject to the jurisdiction of the Commission" (Pet. App. 15a). However, Section 205(b) already limits the Commission's jurisdiction "to any transmission or sale subject to the jurisdiction of the Commission." Under the reasoning of the court

[5] See *Alabama Electric Cooperative, Inc.* v. *Alabama River Company*, 38 F.P.C. 962, 974–75. See also, *St. Michael's Utility Commission* v. *Eastern Shore Public Service Co.*, 35 F.P.C. 591, 595; *Southwestern Public Service Company*, 33 F.P.C. 343, 346; *Jaspan* v. *Philadelphia Electric Co.*, 1 F.P.C. 561, 565.

[6] Citing, *Saxbe* v. *Bustos*, 419 U.S. 65; *Investment Company Institute* v. *Camp*, 401 U.S. 617; *Udall* v. *Tallman*, 380 U.S. 1.

of appeals, this statutory language would be superfluous. It is clear that the quoted phrase was not inserted in the Act as mere surplusage. On the contrary, as legislative history demonstrates, that language became part of both Sections 205(b) and 206(a) precisely to insure that discrimination caused by nonjurisdictional, retail rates was outside the scope of the Commission's authority under the Act.

The Federal Power Act of 1935 was introduced in Congress as the Wheeler-Rayburn Bill on February 6, 1935.[7] Section 202(c) of the bill, the forerunner of present Section 205(b), when introduced, read as follows:

> No public utility shall, as to rates, charges, services, facilities or in any other respect, make or grant any preference or advantage to any person or subject any person to any prejudice or advantage. No public utility should establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.[8]

[7] 74th Cong., 1st Sess.; H.R. 5423; S. 1725.

[8] H.R. 5423, p. 103; S. 1725, p. 106. Similarly, Section 208(a) of the Wheeler-Rayburn Bill, the precursor of present Section 206(a) read:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, charges, or classifications, or any of them, demanded, observed, charged, or collected by any public utility for any service, or in connection therewith, or that the rules, regulations, practices, or contracts, or

(Continued)

Thus, Section 202(c) of the Wheeler-Rayburn Bill prohibited discrimination in terms broad enough to encompass prohibition of discrimination between interstate and intrastate rates. This possibility arose from this Court's earlier decision in *Houston, East & West Texas Ry. Co.* v. *United States* (Shreveport case) 234 U.S. 342. In *Shreveport* the Court interpreted Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1),[9] the language of which is nearly identical to the above-quoted provisions of Sections 202(c) and 208(a) of the Wheeler-Rayburn Bill, and stated as follows (243 U.S. at 356):

> This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier.

(Continued)

any of them, affecting such rates, charges, or classifications, or any of them are unjust, unreasonable, discriminatory, or preferential, or in anywise in violation of any provision of law, or that such rates, charges, or classifications are insufficient, the Commission shall determine the just, reasonable, or sufficient rates, classifications, rules, regulations, practices, or contracts, to be thereafter observed and in force, and shall fix the same by order."

[9] Section 3(1) of the Interstate Commerce Act provides:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Nevertheless, despite the breadth of language contained in the bill, its draftsmen had intended to give the Commission authority to remedy only discrimination that arose as a consequence of transmissions or sales *otherwise subject* to the Commission's jurisdiction. This intent is demonstrated by the following colloquy between Representative Pettengill of Indiana, a member of the House Committee on Interstate and Foreign Commerce, and Dozier A. DeVane, Solicitor of the Federal Power Commission and a principal draftsman of the Wheeler-Rayburn Bill, respecting the bill as first introduced:

> Mr. PETTENGILL. You say that this bill gives the Power Commission jurisdiction over wholesale energy in interstate transmission.
>
> Mr. DEVANE. Yes.
>
> Mr. PETTENGILL. Suppose the retail or wholesale rates in intrastate are fixed by the State commission, and were so low that for the company to exist it had to charge exorbitant rates for its wholesale interstate business. Then, would not the doctrine of the Shreveport case apply?
>
> Mr. DEVANE. No, sir.
>
> Mr. PETTENGILL. Why not?
>
> Mr. DEVANE. No, sir; if the utility's rates in the State are fixed so low that they result in

confiscation, then the utility in question has its remedy in court.

Mr. PETTENGILL. The railroads in the Shreveport cases have also.

Mr. DEVANE. The interstate rate should be determined upon its reasonableness, its reasonableness without regard to what the intrastate rate is.

Mr. PETTENGILL. That is what it should be.

Mr. DEVANE. And the intrastate rate should be determined upon its reasonableness.[10]

The same intent was expressed by Clyde L. Seavey, then Chairman of the Commission, in testimony on March 7, 1935 before the same House Committee. Mr. Seavey said in regard to Section 208 of the bill, the forerunner of present Section 206(a), as it stood prior to amendment:

> It cannot be too strongly emphasized that the rate-making power conferred upon the Commission by section * * * 208 is limited to the field in which the States have no constitutional authority. Under the provisions of this title, the power of the States to regulate retail distribution rates, even where the energy comes directly from another State, is expressly preserved: *wholesale rates alone are made the subject of the Commission's jurisdiction.* The rate-making provisions in the present bill are designed merely to fill the gap in regulation which results from the inability of the States to fix wholesale rates. [Emphasis supplied] [11]

[10] Hearings on H.R. 5423, before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., p. 503 (March 12, 1935).

[11] *Id.* at p. 386.

The same point is further emphasized in the following exchange between Mr. Seavey and Representative Cole of Maryland, a member of the House Committee on Interstate and Foreign Commerce and one of the sponsors of the Wheeler-Rayburn Bill:

> Mr. COLE. You have drawn very definite comparisons between title II and the existing Interstate Commerce Act. I am wondering if under the authority of the Shreveport case you feel that this title is broad enough to go in and establish local rates.
>
> Commissioner SEAVEY. No.
>
> Mr. COLE. Why not?
>
> Commissioner SEAVEY. Because the provisions in this act clearly limit the power of the Federal Commission as to the wholesale interstate rates.
>
> Mr. COLE. Yes. Did not the Interstate Commerce Act do the same; but the Interstate Commerce Commission claimed that the local rates were so interrelated, and this right to do that was decided in the Shreveport case?
>
> Commissioner SEAVEY. Well, the Interstate Commerce Act has provisions in it that gives the Interstate Commerce Commission the power to fix intrastate rates when they are a burden upon interstate commerce. This act does not give this Commission the power to fix intrastate rates if they are a burden upon interstate commerce rates.
>
> Mr. COLE. But, this title gives the Federal Power Commission jurisdiction over any phase of this problem which in the judgment of the Commission imposes a burden upon interstate commerce, does it not?

Commissioner SEAVEY. No.

Mr. COLE. It is broad enough in my judgment to do that.

Commissioner SEAVEY. That was not the intention, * * *.[12]

Representative Cole noted that in the *Shreveport* case, *supra,* this Court determined that the ICC could modify *intrastate* rates which unduly burdened *interstate* commerce. The *Shreveport* decision was based on the ICC's broad remedial authority under Section 3(1) of its act, 49 U.S.C. 3(1), quoted above,[13] which

[12] *Id.* at 396. Representative Cole's misgivings were twofold. First, as described above, he was troubled by the fact that in light of the *Shreveport* doctrine the Commission might have authority under Sections 202(c) and 208(a) of the Wheeler-Rayburn Bill to modify intrastate rates that unduly burdened interstate commerce. Cole's second concern was that Section 201(a) of the bill might also give the Commission jurisdiction over intrastate rates. In pertinent part, that Section read:

"The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, except where such electric energy is sold for use within the State in which it is generated."

Chairman Seavey agreed that "a strict construction of that language would allow the Commission to * * * have some jurisdiction over local rates" (*Id.* at p. 396). He referred to this as an "inadvertence" which should be modified by amending the bill (*Id.* at p. 397). The language was amended and appears in its present form in Section 201(b) of the Act, 16 U.S.C. 824(b), which in pertinent part reads:

"The provisions of the Part shall apply to the transmission of electric energy in interstate commerce *and to the sale of electric energy at wholesale in interstate commerce,* but shall not apply to any other sale of electric energy * * *." [Emphasis supplied.]

[13] Page 14, *supra* n. 9, and accompanying text.

closely resembled the language of Sections 202(c) and 208(a) of the Wheeler-Rayburn Bill. In *Shreveport,* the Court held that despite the jurisdictional limitation of Section 1(2) of the Interstate Commerce Act,[14] the broad, unexceptional language of Section 3(1) of that act gave the ICC authority to modify intrastate rates that discriminated against interstate commerce. Focusing on the comprehensive scope of Section 3(1), the Court concluded:

> *The powers conferred by the act are not thereby limited where interstate commerce itself is involved.* This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, *in view of the * * * comprehensive terms of the* [*Act's*] *provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised* * * * [emphasis supplied].[15]

[14] 49 U.S.C. 1(2)(a), which reads:

The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only insofar as such transportation or transmission takes place within the United States, *but shall not apply—*

(a) To the *transportation* of passengers or property, or to the receiving, delivering, storage, or handling of property, *wholly within one State* and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter * * * [emphasis supplied].

[15] 234 U.S. at 358–59.

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Accordingly, in response to substantial concern that Sections 202(c) and 208(a) of the Wheeler-Rayburn Bill would have given the FPC the same authority to modify intrastate rates that was given the ICC under Section 3(1) of the Interstate Commerce Act and the *Shreveport* case, the former provisions were deleted from the bill. Amended bills were submitted in both houses of Congress which substituted the language of present Sections 205(b) and 206(a).[16] Thereafter, Representative Cole made the following statement with respect to these amendments:

> As to the jurisdiction of the States and State commissions, I doubt if any State commision or State officials familiar with the bill *as it is now before you* will say that the jurisdiction of the States has not been safeguarded and protected in a fair and lawful way. *In doing so we have tried—and I think successfully—to avoid the injection into the Federal control, which this title confers, the extension thereof into intrastate activities in the way the Shreveport case might permit* [emphasis supplied].[17]

The critical change in language was the insertion in both Sections 205(b) and 206(a) of the phrase providing that only "with respect to any transmission or

[16] See proposed amendments to H.R. 5423, 74th Cong., 1st Sess., dated June 14 and June 22, 1935. Also see proposed amendments to S. 1725 dated May 4, 1935, and S. 2796, May 7, 1935, offered in substitution for S. 1725. S. 2796 was also submitted in the House of Representatives and with amendments not here relevant it became the Federal Power Act on August 25, 1935.

[17] 79th Cong. Rec. 10384, June 28, 1975.

sale subject to [its] jurisdiction" did the Commission have authority to modify discriminatory rates.

2. The discrimination alleged in this case would, if proven, result not from APLC's wholesale rate, but as a consequence retail rates which, according to the court of appeals, the utility has voluntarily depressed (Pet. App. 22a–23a). Thus, while the impact of the wholesale/retail rate differential may be measured by the difference between the two, the alleged discriminatory conduct would result from the depressed *retail* rates (*Id.*). The court below characterized this matter as "the utility's [APLC's] own decision to *depress certain retail revenues* in order to curb the retail competition of its wholesale customers" [emphasis supplied].[18]

Yet as the foregoing legislative history of the Federal Power Act ineluctably demonstrates, the Congress deliberately denied the FPC any authority to effect non-jurisdictional rates. Recognizing on the basis of this legislative history that the FPC could not remedy discrimination by raising "depressed" retail rates causing same (Pet. App. 15a, 22a), the court of appeals nonetheless incorrectly concluded that it was only *that remedy* that the FPC could not provide, and that the Commission did have jurisdiction to reduce wholesale rates in order to remedy alleged discrimination which would result from "depressed" retail rates

[18] Pet. App. 22a–23a.

(Pet. App. 22a–23a).[19] However, contrary to the conclusions of the court of appeals, it was not just the remedy of upward adjustment of depressed retail rates that Congress withheld from the FPC, but rather jurisdiction to remedy discrimination caused by the juxtaposition of *depressed* retail rates and an otherwise proper wholesale rate. This view is fully confirmed by the Senate Report on S. 2796, the substitute bill which became the Federal Power Act. As the report clearly states, only those acts of discrimination

[19] We note in passing that the court of appeals cited (Pet. App. 17a–19a) various provisions of the Federal Power Act which involve the Commission in consideration of non-jurisdictional matters. *E.g.*, Section 206(b), 16 U.S.C. 824e(b) (authority to investigate nonjurisdictional sales); Section 209(b), 16 U.S.C. 824h (b) (the FPC's authority to confer with a State commission regarding the rates of a utility subject to the jurisdiction of both); Section 311, 16 U.S.C. 825j (authority to investigate the generation, distribution, etc., of electric energy even where not subject to the Commission's jurisdiction). Despite its reference to these provisions, the court below recognized that none of them give the FPC authority to remedy abuses by changing nonjurisditcional rates.

In this regard, the court (*Id. at* 19a) also refers to *Southwestern Public Service Co.*, 33 F.P.C. 343. In *Southwestern* the issue was whether a lower wholesale rate to rural electric cooperatives as opposed to other wholesale customers, a difference not based on cost of service, was undue discrimination. In that case the utility had offered cooperatives the lower rate in order to retain them as customers. On the other hand, this reduced fixed costs to the utility's remaining customers—a benefit that would have been lost but for the lower rate to cooperatives. In finding that the cooperatives' rate was not unduly discriminatory the Commission considered evidence of whether that rate competitively disadvantaged other wholesale customers, and found that it did not (*ibid.* at pp. 350–51). However, the Commission did not review that evidence for the purpose of reducing jurisdictional wholesale rates.

A related case is *Florida Gas Transmission Co.*, Op. No. 611, 47 F.P.C. 341, 366–67, cited by Conway in its brief opposing certiorari (p. 7) and initial brief below (pp. 19–20). The interruptible rate there in question was not, as Conway implies, imposed by the Commission. It was voluntarily offered by the utility, without objection from its remaining customers, so that interruptible gas service would be competitive with other fuels. This in turn reduced the fixed cost burden upon the utility's remaining customers—a benefit that would otherwise have been lost, Op. No. 611–A, 49 F.P.C. 261, 263–64.

referable to a jurisdictional wholesale rate come within the provisions of Section 205(b):[20]

> Subsection (b) prohibits the granting of undue preferences or advantages to any person with respect to any service subject to the jurisdiction of the Commisison.

Obviously, a preference caused by a non-jurisdictional rate, such as the depressed retail rate in this case, is not subject to the Commission's jurisdiction under Section 205(b) and 206(a) of the Federal Power Act. This view is confirmed by Mr. Justice Jackson's concurring opinion in *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 615, where it was stated with respect to Sections 4(b) and 5(a) of the Natural Gas Act, 15 U.S.C. 717c(b) and 717d(a),[21] the verbatim

[20] See S. Rep. No. 621, 74th Cong. 1st Sess. 51 (1935).

[21] Decisions interpreting these parallel provisions of the Natural Gas Act are applicable to interpretation of Sections 205(b) and 206(a) of the Federal Power Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 346–47; *Municipal Light Boards* v. *FPC*, 450 F. 2d 1341, 1347 (C.A.D.C.).

counterparts of Sections 205(b) and 206(a) of the Federal Power Act:

> * * * [The] Act forbids discrimination only as between regulated rates and does not forbid discriminations between the regulated and unregulated ones.[22]

In rejecting the Commission's interpretation of the jurisdictional limitations of Sections 205(b) and 206 (a), the court of appeals misinterpreted this Court's decision in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, decided the same day as *Colorado Interstate, supra.* In *Panhandle* the Commission had ordered a natural gas company to reduce its wholesale rates. Panhandle's business was almost exclusively wholesale and subject to the Commission's rate

[22] In its reply brief below (at p. 16), Conway seemingly criticized use of the quoted statement because of Mr. Justice Jackson's additional statement that the jurisdictional limitation did not preclude reference to a "fairly bargained selling price as a standard of what is a 'just and reasonable' price," and that comparison of the former with the regulated price could be "a basis" for reducing the latter, 324 U.S. at 615. However, the rate reductions ordered in *Colorado Interstate*, which Justice Jackson fully supported, "were measured *solely* by the excess revenues over costs *in the regulated business*", 324 U.S. at 588 [emphasis added]. Moreover, of course, Conway *did not* offer evidence of APLC's retail rates in order to impeach the credibility of the cost of service presentation supporting APLC's wholesale rate filing, but rather to seek reduction of the wholesale rate because it exceeded the retail rate.

In this regard, also note that Conway's reference in its brief opposing certiorari (pp. 6–7) to *Otter Tail Power Company*, 2 F.P.C. 134, 149, *Gulf States Utilities Co.*, 1 F.P.C. 522 and *Wisconsin-Michigan Power Co.*, 31 F.P.C. 1445, begs the question under consideration above, because in each of those cases the issue was discrimination between *wholesale* rates.

jurisdiction; however, the company had a few direct industrial customers. The Court noted that as a general rule "the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both," 324 U.S. at 641. However, Panhandle had never built any gas plant to serve its nonjurisdictional industrial customers, all of whom were subject to interruption when necessary to satisfy wholesale demands. Moreover, its entire business was operated as a single unit. On its books Panhandle made no segregation of costs or profits as between classes of service, and its president testified that any attempt to allocate costs would be "unrealistic" and "not practical", 324 U.S. at 640. On the other hand, it was agreed that some division of profit between the two classes had to be made lest the regulated business be saddled with costs fairly attributable to direct industrial sales.

Therefore, rather than make a formal cost allocation, the Commission apportioned to the wholesale business all earnings above a certain percentage. The Court concluded that the Commission's judgment as to fair allocation of earnings was a proper exercise of its discretion, and that no formal cost allocation was necessary "under the exceptional circumstances of this case", 324 U.S. at 642. As the Court stated:

> We do not mean to imply that such concessions would warrant a departure of the Commission from the statutory scheme of regulation. The issue is a much narrower one. The

> Commission did not undertake to fix industrial rates. The Commission, as was its duty, merely determined what earnings were properly allocable to the unregulated business. Petitioner disagrees with the result. The use of a formula for an allocation of costs or a segregation of property might or might not have been more favorable to petitioner. But once the use of such formula is waived or is conceded to be impractical or theoretical, there must be some discretion in the Commission to make that determination through the exercise of its informed judgment. We cannot say that the Commission abused its discretion * * *.

Expressly recognizing that *Panhandle* was clearly distinguishable from the present case (Pet. App. 18a), the court of appeals nevertheless concluded that the "underlying principle" of *Panhandle* permits the Commission to consider matters otherwise nonjurisdictional "when germane to the meaningful execution of a jurisdictional function." We need not quarrel with that general proposition to recognize that the court of appeals begged the question in asserting that *Panhandle* supported the FPC's authority to remedy a discrimination between jurisdictional and non-jurisdictional rates. To be sure *Panhandle* supports the FPC's authority to review non-jurisdictional matters when relevant to a jurisdictional function, it does not however support the expansion of FPC's jurisdiction to remedy alleged discrimination caused by a "depressed" non-jurisdictional rate. Thus, the court of

appeals ignored the essential rationale of *Panhandle*, which is that in order to properly set rates for jurisdictional service the Commission necessarily had to segregate nonjurisdictional operations from the integrated whole. That was the limit of the Commission's consideration of nonjurisdictional matters in *Panhandle* and under the Court's decision nothing more would be permissible.

In clear contrast is the present case. The issue here is *not* whether evidence of retail costs may be considered when determining the properly allocated wholesale cost of service. On the contrary, the present issue is whether the Commission has authority to order a reduction in otherwise just and reasonable wholesale rates because of APLC's allegedly anti-competitive, depressed retail rates (Pet. App. 22a–23a). *Panhandle* offers no support for that proposition, and, as we explain below, under Sections 205(b) and 206(a) of the Federal Power Act the Commission has no authority to make such a reduction in otherwise just and reasonable rates.[23]

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[23] Conway also argued in its reply brief below (pp. 14–16) and in its brief opposing the petition for certiorari herein (pp. 7–8) that even if the Commission were correct in its analysis of Sections 205(b) and 206(a), the Commission would nevertheless be required under Sections 19 and 20 of the Federal Power Act, 16 U.S.C. 812 and 813, to remedy discrimination resulting from an alleged price squeeze. The latter provisions apply to persons, including AP&L, who operate hydroelectric projects licensed by the Commission. Although this argument was made below, it was not addressed in the circuit court's opinion.

(Continued)

B. THE RELIEF ORDERED BY THE COURT BELOW IS INCONSISTENT WITH THE COMMISSION'S RESPONSIBILITY TO ASSURE JUST AND REASONABLE WHOLESALE ELECTRIC RATES.

1. The Commission's responsibility to assure "just and reasonable" wholesale electric rates derives from Section 205(a) of the Federal Power Act, 16 U.S.C. § 824d(a).[24] The Commission's responsibility in this

(Continued)

The fallacy of Conway's argument in this regard is that Sections 19 and 20 authorize the Commission to remedy a licensee's discriminatory rate practices *only* where no state agency has authority to do so. *Louisville Gas & Electric Co.* v. *FPC*, 129 F. 2d 126, 132 (C.A. 6), certiorari denied, 318 U.S. 761. However, the State of Arkansas has a public service commission with ample authority to prohibit such discrimination. *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, cited by Conway for the proposition that states can not regulate wholesale rates, is irrelevant because in remedying such discrimination the state would not be required to reduce wholesale rates. Where the utility has voluntarily maintained depressed retail rates for the purpose of curbing competition within the state, an increase in the state controlled rate can be ordered. Thus, states are not without constitutional authority to remedy such discrimination (see n. 11, *supra*, p. 16, and accompanying text).

The fact that the state commission may be reluctant to increase the overall cost of service to its citizens in order to protect the competitive position of some only serves to emphasize a point discussed below, *i.e.* Conway should seek relief from the alleged price squeeze in the federal courts.

[24] Section 205(a) provides:

"All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

The "just and reasonable" rate standard of Section 205(a) and the nonpreference standard of Section 205(b) are both enforced under the provisions of Section 206(a).

regard is to establish rates which enable the utility to provide adequate, reliable service at the least cost to the consumer while at the same time maintaining the utility's financial integrity.[25] The Commission's inquiry in this regard is a carefully circumscribed economic determination made on the basis of costs.

Nevertheless, the court of appeals, while acknowledging that cost of service is the Commission's guidepost in exercise of its ratemaking function, erroneously relied on *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, and this Court's interpretation therein of the "public interest" standard contained in Section 204 of the Federal Power Act, as a basis for ordering rate reductions under Section 206(a) of the Act (Pet. App. 20a).[26] Under Section 204, 16 U.S.C. § 824c, utilities must obtain the Commission's approval before issuing new securities. In *Gulf States* the Court held that allegations of anticompetitive conduct were proper for

[25] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 605.

[26] In its brief opposing the petition for certiorari herein (pp. 4–5), initial brief below (pp. 16–17) and petition for rehearing (J.A. 60–61), Conway refers to pp. 7, 12, 13–15 and 19 of the Commission's brief to this Court in *Gulf States*. By this reference Conway seems to attribute to the FPC the conclusion that it had jurisdiction to remedy the price squeeze complained of here. The Commission, of course, said no such thing. On the contrary, what the Commission said is that under certain provisions of the Federal Power Act it has authority to consider antitrust allegations and fashion relief when necessary. However, the Commission's authority in this regard is limited, *cf.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 375, it cannot remedy all anticompetitive conduct regardless of form. See also, *Northern California Power Agency* v. *FPC*, 514 F. 2d 184, 187.

consideration under Section 204's "public interest" standard. The Court's opinion emphasizes the Commission's broad powers under Section 204 and the varied and flexible remedies to the Commission if such allegations were proven. As the Court explained (411 U.S. at 756):

> The mandate that § 204 of the Federal Power Act, 16 U.S.C. § 824c, imposes upon the Commission is a broad and impressive one. Section 204(a) empowers the Commission to authorize the issue of a security by a public utility *only* "if it finds that such issue . . . is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest."
>
> *In making its determination under § 204(a), the Commission is given broad powers of inquiry and enforcement.* By § 204(b) it may hold hearings on the application, may grant the application "in whole or in part," may modify it, and may impose such terms or conditions "as it may find necessary or appropriate." * * * Section 204(c) grants the Commission authority to specify the purpose to which the proceeds of the security may be applied and the amount allowed for that purpose [emphasis supplied].[27]

[27] Thus, when at a later point the Court makes a general reference to the Commission's "broad regulatory power" as including consideration "*in appropriate circumstances*" of the "anticompetitive effects of *regulated aspects* of interstate utility operations." [emphasis supplied] 411 U.S. at 758–59, the Court is again addressing situations where the Commission's authority under the particular statute involved is broad enough to (1) include consideration of the anticompetitive conduct complained of and (2) fashion a meaningful and effective remedy.

Accordingly, the Commission gives full consideration to antitrust allegations in wholesale rate proceedings where the issue is properly raised and where appropriate relief is within the Commission's authority to grant. See, *e.g.*, *Wisconsin Public Service Corp.*, 54 F.P.C. —, Docket No. E–8867, order issued October 21, 1975; *Public Service Co. of Indiana*, 53 F.P.C. —, Docket No. E–8556, order issued March 17, 1975; *Northern States Power Co.*, Docket No. E–9155, order issued February 5, 1975 (unreported); *Virginia Electric and Power Co.*, 53 F.P.C. —, Docket No. E–9147, order issued January 22, 1975; *Boston Edison Co.*, 52 F.P.C. —, Docket Nos. E–8187 and E–8700, order issued September 25, 1974; *Carolina Power & Light Co.*, 52 F.P.C. 399; *Southwestern Public Service Co.*, 51 F.P.C. 2426; *Pacific Gas & Electric Co.*, 51 F.P.C. 1030; *Carolina Power & Light Co.*, 49 F.P.C. 645; *Kentucky Power Co.*, 49 F.P.C. 564; *Mississippi Power Co.*, 45 F.P.C. 269; *Georgia Power Co.*, 35 F.P.C. 436, affirmed, *sub nom. Georgia Power Co.* v. *F.P.C.*, 373 F.2d 485 (C.A. 5).

The Court underscored the breadth of the public interest standard "as embodied in Section 204," 411 U.S. at 758. The Court stated (411 U.S. at 759):

> *Under the express language of § 204 the public interest is stressed as a governing factor. There is nothing that indicates that the meaning of that term is to be restricted to financial considerations,* with every other aspect of the public interest ignored. Further, there is the section's requirement that the object of the issue be lawful. The Commission is directed to inquire into and to evaluate the purpose of the issue and the use to which its proceeds will be put. Without a more definite indication of contrary legislative purpose, we shall not read out of § 204 the requirement that the Commission consider matters relating to both the broad pur-

poses of the Act and the fundamental national economic policy expressed in the antitrust laws. [emphasis supplied]

In contrast to the Court's conclusions in *Gulf States* regarding the Commission's "broad powers of inquiry and enforcement" under the statutory "public interest" concept embodied in Section 204 of the Federal Power Act, is the FPC's far more technical responsibility to assure "just and reasonable" rates under Sections 205(a) and 206(a) of the Act. The latter requires economic and financial computation made on the basis of wholesale costs (J.A. 53). The Commission's ratemaking authority under Sections 205(a) and 206(a) does not give it authority to reduce rates, otherwise wholly justified on the basis of such costs, because of voluntarily depressed nonjurisdictional retail rates—extrinsic to the cost of providing the jurisdictional service. Wholesale rates must recover the cost of providing wholesale service, plus a reasonable return, and the costs incurred in providing such service do not become otherwise imprudent, improper or excessive because of allegations of anticompetitive conduct in unregulated matters.[28]

[28] In this connection we note that the discriminatory, depressed intrastate railroad rates in *Shreveport, supra*, although established by the Railroad Commission of Texas, were accepted and fully acquiesced in by the railroads "without more, at most, than a perfunctory protest." (see 205 F. 380, 386). However, totally absent from the Court' opinion is any intimation that the railroads' blithe acquiescence in depressed *intrastate* rates would permit imposition of a lower *interstate* rate than was otherwise just and reasonable. As the Court stated (234 U.S. at 355, 360):

"It is * * * clear that in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to [otherwise] be a proper standard * * *.

* * *

"So far as these interstate rates conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them * * *."

In a related context involving the Interstate Commerce Commission's ratemaking authority, this Court recently concluded that while "the standards of the Act are broad enough to permit consideration of environmental factors * * *" (*Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 323, n. 21):

> * * * [S]tandard rate-making criteria limit the power of the ICC to force railroads to transport recyclable materials at deficit rates no matter how much the environment would be benefited thereby and no matter how much environmental injury would be caused by not doing so.

Moreover, in *Southern Pacific Co.* v. *ICC*, 219 U.S. 433, the Court held that in establishing just and reasonable rates under Section 15(1) of the Interstate Commerce Act, 49 U.S.C. 15(1), the analog of Section 206(a) of the Federal Power Act, the ICC would not reduce a railroad's requested rate increase, otherwise justified on the basis of costs, simply because the increased rate would destroy a business built up in reliance on the former rate. The Court held that the ICC's order was based on an assumption of powers that the

ICC did not have, 219 U.S. at 444. As Chief Justice White concluded for the Court (*ibid.* at 445):

> [T]he subject complained of was not the intrinsic unreasonableness of the new rate * * *, but the injury it was thought would be suffered from not continuing the old rate in force, an injury arising from circumstances extrinsic to the new rate; that is, a loss which would be suffered by substituting the higher rate, even if that rate was in and of itself reasonable and just.

2. While purporting to recognize the statutory factors which define and limit the Commission's ratemaking authority, the court below found sufficient "latitude" to permit the Commission to remedy a price squeeze by lowering the wholesale rate (Pet. App. 22a). The court argued that there is a "zone of reasonableness" and the Commission can "at the very least * * * put wholesale rates at the lower range of the zone of reasonableness when it finds anticompetitive conduct" (*ibid*). Unfortunately, the court of appeals has ignored the essential requirements of the Commission's ratemaking function and has imposed a totally inappropriate means of relief from the alleged price squeeze.

As this Court has often explained, the "zone of reasonableness" standard is simply a restatement of the doctrine of judicial deference to the expertise of an administrative agency. Accordingly, in *FPC* v. *Natural Gas Pipe Line Co.*, the Court stated that "there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and

higher than a confiscatory rate," [emphasis supplied] 315 U.S. 575, 585. Similarly, in *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, the Court stated that reviewing courts "are without authority to set aside any rate selected by the Commission which is within the 'zone of reasonableness'".[29] Although the courts will defer to the Commission's rate determinations when they are within the "zone of reasonableness", the Commission's task is not so limited for it must also determine with as much exactness as possible the precise level appropriate for the rate in question.

As noted above, the Commission's specific responsibilities in establishing wholesale electric utility rates is to determine that rate which will permit the utility to provide adequate, reliable service at the least cost to the consumer while at the same time maintaining the utility's financial integrity.[30] Contested rates typically require lengthy and complex evidentiary hearings, wherein the record established is voluminous in size and requires detailed and exhaustive consideration by the Commission. In making its analysis the

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[29] See also, *Mobil Oil Corp.*, v. *FPC*, 417 U.S. 283, 307; *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 29; and *Placid Oil Co.* v. *FPC*, 483 F.2d 880, 889, n. 6 (C.A. 5).

The consequences of combining the above-quoted *Permian* standard and the test announced by the court of appeals are interesting. The FPC would first, without regard to the anti-competitive retail rate, determine the wholesale rate. Assuming that the FPC's determination was within the "zone of reasonableness", the courts would then necessarily defer to that rate provided the FPC would, as a second step, subtract from the rate some value related to the anti-competitive factor.

[30] *FPC* v. *Hope Natural Gas Co.*, *supra*, 320 U.S. 591, 605.

Commission does not locate a "zone of reasonableness" and then select a rate within that zone.[31] Rather, as Section 206(a) of the Power Act expressly states, the Commission must determine the single proper rate—"*the* just and reasonable rate" [emphasis supplied] required by Section 206(a)—on the basis of its assessment of the cost evidence.

In providing electric service a utility incurs a myriad of costs, which, to mention just a few, will include plant investment, fuel costs, labor and managerial expense, capital costs, depreciation, and taxes. As stated in *Mississippi River Fuel Corp.* v. *FPC,* 163 F.2d 433, 437 (C.A.D.C.):

> The regulated sales in this case, being the sales to utility companies for resale, are easily identified. The problem is to ascertain the costs incurred prerequisite to such sales, and so to be borne by those customers. *This is a question of fact. Expenses * * * are facts. They are to be ascertained, not created, by the regulatory authorities.* If properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return

[31] In setting area rates for natural gas producers, the Commission customarily finds a range of reasonable rates and selects a rate within the range. See, *e.g., Placid Oil Co., et al.* v. *FPC,* 483 F.2d 880 (affirmed *sub nom. Mobil Oil Corp.* v. *FPC,* 417 U.S. 283, *supra*). The "zone of reasonableness" in producer ratemaking exists because, given the lists of available data and methodology, the costing of natural gas production is necessarily somewhat imprecise, and because average costs, rather than individual company-by-company costs, are investigated. There is, for all practical purposes, no "zone of reasonableness" in electric utility ratemaking because precise data is available and rates are reviewed on a company-by-company basis.

> upon the investment, being an amount over and above expenses, would be a farce [emphasis supplied].

Thus, the typical controversy in a rate proceeding is not over valuation of these specific cost items, but whether specific items of known value may be properly recovered and by whom. Moreover, when, as in the present case, only part of the utility's business is regulated by the Commission, there must be a separation of the costs incurred in rendering jurisdictional service from those which are not.[32]

While the Commission must necessarily make judgments in resolving these matters, its judgments do not create a "zone of reasonableness". As stated above, expenses are facts "to be ascertained, not created, by regulatory authorities." Allegations concerning depressed, nonjurisdictional retail rates (Pet. App. 22a), have no relation to the cost of wholesale service. It would be simply irrational to disallow a legitimate item of cost, such as fuel expense, upon an allegation that the nonjurisdictional retail rate is set too low.

Moreover, even capital costs such as the cost of debt and preferred stock are essentially known and measurable expenses that must be ascertained in rate proceedings. Thus, the only "zone of reasonableness" which might be found in utility ratemaking is the range of potentially appropriate rates of return on common equity. But even here there is no opportunity

[32] *Panhandle Eastern Pipeline Co.* v. *FPC, supra,* 324 U.S. 635, 641.

to consider allegations of anticompetitive conduct because the Commission must make a cost analysis wherein it determines, for the specific utility involved, that rate of return on common equity which is commensurate with the risks associated with the investment, and which will be sufficient to maintain existing equity investment as well as attract new capital at reasonable costs.[33]

The standards governing rate of return are fully set forth in *Bluefield Waterworks & Improvements Co.* v. *Public Service Commission of West Virginia*, 262 U.S. 679:

> What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties * * *. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

[33] The Commission does permit any interested party to submit relevant evidence, including evidence of monopolization, which bears upon the risk associated with investment. *Pacific Gas & Electric Co.*, 52 F.P.C 385. Conway's allegations, however, were not of this kind; rather, it asked the Commission to determine the wholesale rate by reference to nonjurisdictional retail rates.

Similar to the *Bluefield* test is that announced in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, *supra:*

> * * * [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. * * * By that standard *the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.* [Emphasis supplied].

Hope requires the Commission to consider a variety of different sources of economic and financial data regarding the return on equity appropriate for a

given utility. As a basic guideline the Commission must measure the utility's financial record during previous years with that of similar utilities of comparable size and risk. This requires consideration of the utility's overall capital structure and earnings record during the period studied. Particular attention is paid to net operating income and earnings coverage for debt and preferred stock. Attention must also focus on previous trends in the utility's plant investment and operating expenses as well as anticipated future requirements under these categories. In this regard reference is made to expected growth in demand in the area served. The added cost of compliance with environmental regulations, inflationary pressures and regulatory lag also require consideration in determining the proper rate of return. Finally, the utility's earnings records must be compared to that of other industries with which the utility and the electric industry in general compete for investment capital.

While in reaching its conclusion the Commission must necessarily make judgments based on its accumulated expertise, the process is nevertheless one of determining with as much accuracy as possible the lowest cost of equity capital adequate for maintainng the utility's financial integrity and attracting needed capital. It would make no sense, and would indeed be impermissible, to ignore the cost of equity capital and impose a rate of return that fails to satisfy these criteria, because of allegations of price squeeze.

C. THE COMMISSION'S LACK OF AUTHORITY TO REMOVE THE DISCRIMINATION ALLEGED HERE DOES NOT IMPAIR RESPONDENTS' ACCESS TO A COMPLETE REMEDY.

The Commission's lack of authority to remedy the alleged price squeeze caused by the retail/wholesale rate differential does not create any regulatory gap or leave Conway without a complete remedy.[34] APLC's wholesale rates are regulated by the FPC, and allegations of anticompetitive conduct raised in the course of such proceedings will be fully addressed when they relate to matters within the scope of the Commission's jurisdiction and with respect to which the Commission has authority to grant appropriate relief.[35] Moreover, APLC's retail rates have been and will continue to be regulated by the Arkansas Public Service Commission.[36] Finally, the price squeeze alleged herein, assuming its existence despite recourse to the remedies referred to above, is cognizable in the federal courts. In this regard, Conway argues that the alleged price squeeze is in violation of the Sherman Act, 15 U.S.C.

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[34] Addressing this question in its initial brief below (p. 24), Conway stated that it "could not bring suit in the Federal District Court or State courts to recover their damages from the illegal price squeeze" because the Commission would "assert primary [or exclusive] jurisdiction in any [such] proceeding." However, Conway's concern is quite misplaced. While the Commission's jurisdiction is primary and exclusive in determining the proper level of wholesale rates, that in no way diminishes Conway's right or ability to seek judicial relief from a price squeeze resulting from voluntarily depressed retail rates (Pet. App. 22a–23a).

[35] See n. 27, *supra*, pp. 30–31.

[36] See n. 19, *supra*, pp. 22–23.

1, *et seq.*, and the Clayton Act, 15 U.S.C. 12, *et seq.* (J.A. 56). Conway has described APLC's conduct as follows:

> * * * a conscious, intentional effort on the part of AP&L to alter the historic relationship between wholesale and large industrial rates in such a fashion as to drive the publicly owned customers out of business as competitors for these desirable retail sales to new or expanded industrial loads, * * * [and] a further step toward the AP&L's goal of takeover of these customers.[37]

Enactment of the Federal Power Act did not immunize APLC's conduct from regulation under the antitrust laws.[38] Conway's allegations, if proven, would be in violation of the antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and subject to court injunction and other relief. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 436–438 (1945). Accordingly, there is no gap in regulation and Conway's rights are fully protected.

CONCLUSION

The decision of the court of appeals incorrectly holds that the Federal Power Commission has authority under the Federal Power Act to adjudicate claims concerning alleged anticompetitive retail rates which are not otherwise subject to the Commission's

[37] Conway's initial brief below, p. 9.

[38] *Cf. Otter Tail Power Co.* v. *United States, supra,* 410 U.S. at 374–75.

jurisdiction. That erroneous decision should be reversed.

Respectfully submitted,

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I authorize the filing of the above brief.
ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

APPENDIX

The Federal Power Act provides in pertinent part:

DECLARATION OF POLICY; APPLICATION OF PART; DEFINITIONS

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [49 Stat. 847; 16 U.S.C. 824(a)]

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce, and to the sale of electric at wholesale in interstate commerce but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of elec-

tric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce or over facilities for the transmission of electric energy consumed wholly by the transmitter. [49 Stat. 847–848; 16 U.S.C. 824(b)]

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. [49 Stat. 848; 16 U.S.C. 824(c)]

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale. [49 Stat. 848; 16 U.S.C. 824(d)]

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. [49 Stat. 848; 16 U.S.C. 824(e)]

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [49 Stat. 848; 16 U.S.C. 824(f)]

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [49 Stat. 851; 16 U.S.C. 824d(a)]

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. [49 Stat. 851; 16 U.S.C. 824d(b)]

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner

affect or relate to such rates, charges, classifications, and services. [49 Stat. 851; 16 U.S.C. 824d(c)]

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [49 Stat. 851–852; 16 U.S.C. 824d(d)]

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such

schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 852; 16 U.S.C. 824(e)]

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FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 206 (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission, or sale subject to the jurisdiction of the Commission, or that any rate, regulation, practice, or contract affecting such rate, charge, or classification in unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. [49 Stat. 852; 16 U.S.C. 824e(a)]

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852; 16 U.S.C. 824e(b)]

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OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ARKANSAS POWER & LIGHT COMPANY

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ARKANSAS POWER & LIGHT COMPANY

OPINIONS BELOW

The opinion of the court below is that of the United States Court of Appeals for the District of Columbia Circuit in *Conway Corporation* v. *Federal Power Commission* (Petition, App. A)[1], on an appeal of Conway Corporation, *et al.*, for review of orders of the Federal Power Commission in Docket Nos. E-8250, *et al.*, dated July 31, 1973 (Petition, App. C), October 29, 1973 (Petition, App. D), and December 5, 1973 (Petition, App. E).

[1] "Petition, App." refers to the appendices to the Federal Power Commission's petition for a writ of certiorari.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the court of appeals was founded on Section 313(b) of the Federal Power Act, 16 U.S.C.825*l*(b).

The judgment below was entered April 4, 1975 and is reported at 510 F.2d 1264 (D.C. Cir. 1975). On November 11, 1975, the Supreme Court granted the petition for a writ of certiorari of the Petitioner in *Federal Power Commission* v. *Conway Corporation, et al.*, No. 75-342.

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred by holding that the Federal Power Commission has the statutory authority to adjudicate allegations of discrimination between the rates for jurisdictional wholesale sales of electricity and retail sales of electricity, which are not subject to the Commission's rate reviewing power?

STATUTES INVOLVED

Relevant sections from the statutes involved are printed in the appendix to this brief. They are:

Sections 201, 205, and 206 of the Federal Power Act, 16 U.S.C. §§824, 824d, 824e;

Sections 1(b) and 5(a) of the Natural Gas Act, 15 U.S.C. §§717(b) and 717d(a).

STATEMENT OF THE CASE

1. Arkansas Power & Light Company

Arkansas Power & Light Company (AP&L or Company) owns and operates an integrated electric power production, transmission and distribution system in 62 counties of the state of Arkansas, supplying power and energy at retail and wholesale to various customers. Included among the Company's wholesale customers, which purchase power and energy from AP&L and then resell it to customers of their own, are the respondents, Conway Corporation, *et al.* (Conway).[2]

AP&L is a "public utility" within the meaning of §201(e) of the Federal Power Act (Act), 16 U.S.C. §824(e), since the provisions of the Act apply to the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. As a jurisdictional public utility, AP&L must submit any changes which it proposes in its interstate wholesale rates to the Federal Power Commission (Commission) for approval, and this Commission has exclusive rate reviewing authority over such rates. The rates at which AP&L sells electric power and energy to its retail customers in Arkansas are subject only to the jurisdiction of the Arkansas Public Service Commission.[3]

---

[2]The following municipalities and rural electric cooperatives, which are wholesale customers of AP&L, are the respondents in this proceeding and are collectively referred to as "Conway": Conway Corporation (Conway, Arkansas); Benton Municipal Light and Water Works; Hope Water & Light Commission; City of North Little Rock; City of Osceola; City of Prescott; City of West Memphis; Farmers Electric Cooperative Corporation; and Mississippi County Electric Cooperative.

[3]The rates at which municipalities in Arkansas sell electric power and energy to their own retail customers are not regulated, either by the Federal Power Commission or the Arkansas Public Service Commission.

2. The Federal Power Commission Proceedings Involved

On June 1, 1973, AP&L filed with the Commission an application for increase in wholesale rates pursuant to §205(d) of the Federal Power Act, 16 U.S.C. §824d(d). In that filing, the Company showed that for the twelve months ended July 31, 1972, AP&L had earned a rate of return of 4.75% on the rate base allocated to its municipally owned wholesale customers, and a rate of return of 1.79% on the rate base allocated to its rural electric cooperative wholesale customers. Thereafter, on June 28, 1973, Conway sought intervention and urged the Commission to reject AP&L's proposed increase by asserting among other things that:

> Insofar as petitioners can ascertain, the sole reason which AP&L has for filing this unilateral rate increase is an attempt to squeeze petitioners or some of them out of competition, and to make them more susceptible to the persistent attempts of the company to take over the publically [sic] owned systems in the State.
>
> • • • • •
>
> By this filing, AP&L seeks to force an end to the pre-existing competitive situation. While it here seeks to impose rate increases of 22.6% upon the cities and 34.9% upon the coops,[4] it has indicated no intent of filing to change its own longstanding industrial rates.[5] As will be shown, the proposed rates here are such that it would be impossible for petitioners to sell power to an industrial load of any size at a competitive price with AP&L, since, in many cases, the revenues therefrom would not even cover the incremental power costs to petitioners.
>
> • • • • •
>
> . . . [AP&L's] filing should be rejected as a result of the obvious price squeeze which AP&L has sought to impose without cost basis therefore.
>
> • • • • •
>
> . . . [S]ince the company has filed a plainly discriminatory rate against the single class of customer which it has historically attempted to drive out of business, without justification on any necessary cost of service basis, the filing should be rejected out of hand . . . . (Footnotes added)

AP&L responded to Conway's protest stating that the proposed increase was designed strictly to achieve a satisfactory return on its wholesale business and denying categorically that the Company had attempted or was then attempting to squeeze its wholesale customers out of competition.[6] AP&L further stated that the proposed

[4]In its response, the Company pointed out that the actual percentage increases to the municipalities and cooperatives would be 19.4% and 27.2% respectively, assuming that the rate increase was granted in its entirety. Further, as the Commission correctly pointed out in *Metropolitan Edison Co.*, 46 F.P.C. 563, 564 (1971), "[i]t is the increased rate not the increase-in-rate which must be tested to determine its justness and reasonableness."

[5]On March 18, 1974, AP&L filed with the Arkansas Public Service Commission an application to increase the rates applicable to its retail customers, which would increase industrial rates by 22.6% if granted in its entirety.

[6]It is important to note that AP&L has not, in fact, engaged in any anticompetitive activity and, in particular, has never attempted to "squeeze" its wholesale customers out of business. Contrary to the court's implication (Petition, App. A, p. 3a), the rate filing being contested in this proceeding did not raise AP&L's wholesale rates above or even to the level of its retail rates. That the Company has not engaged in any anticompetitive activity is further supported by the following excerpt from the U.S. Department of Justice, Antitrust Division, letter of December 12, 1971, to the then Atomic Energy Commission in connection with the Company's application to construct a nuclear power plant. As the Department of Justice stated:

> [AP&L] presently has dominance in electric bulk supply and transmission in a major portion of Arkansas. But *we have found no evidence that [AP&L] has exercised that control to the detriment of competition.* (36 Fed. Reg. 25240, December 30, 1971) (Emphasis supplied)

increase in wholesale rates would not prevent Conway from competing for industrial loads with AP&L. On July 31, 1973, the Commission issued an order which accepted the proposed rate schedules for filing, suspended the proposed rates for the maximum statutory period and permitted them to go into effect on January 1, 1974, subject to refund, and set the matter for hearing to determine the justness and reasonableness of the proposed rates (Petition, App. C). The Commission granted Conway's petition to intervene but refused to allow Conway to introduce evidence of the alleged "price squeeze" since Conway had not demonstrated that the Commission had the authority to direct relief even if the allegation were true. The Commission further stated that Conway had the right to file an amended petition setting forth the requested relief which was within the Commission's authority to direct.

In response, Conway filed an amended petition which requested the Commission "to reduce the proposed [wholesale] rates filed by AP&L to eliminate the [alleged] anticompetitive price squeeze, within its authority under Sections 205 and 206." On October 29, 1973 the Commission again concluded that the relief sought was beyond its jurisdiction (Petition, App. D). The Commission reasoned:

> The relief sought by Petitioners is beyond the authority granted to us under the Federal Power Act. Under the Federal Power Act this Commission is charged with the responsibility for reviewing rate applications to insure that the rates proposed are just and reasonable. [AP&L] has submitted its full evidentiary presentation including a cost of service as well as testimony and exhibits of their witnesses which they state support the subject wholesale rate increase. That evidence, including [AP&L's] allocation of its costs to its wholesale service, is, of course, subject to review and cross-examination by all parties

> including the intervenors and also of course subject to review and decision thereon by the Presiding Trial Judge assigned to the case as well as the Commission itself.
>
> Wholesale rates must recover allocated wholesale costs. Customers' suggested relief is a rate related not to wholesale costs but rather related to [AP&L's] industrial rates. However, [AP&L's] industrial rate level and the accounting and rate making principles underlying that rate level is under the sole jurisdiction of the state commission and not the Federal Power Commission. We have no jurisdiction over [AP&L's] industrial rates, and we do not choose to open this hearing to examination of those rates. Such an action would require a detailed analysis of [AP&L's] retail cost of service and would result in this Commission interjecting itself into an area in which it has no jurisdiction.
>
> Petitioners' allegation of 'price squeeze' in and of itself, does not constitute anticompetitive behavior by [AP&L] given the fact that any wholesale rates we approve must be based on allocated wholesale costs. To approve rates which recover less than those costs would produce grave consequences, since such action would be tantamount to imposing confiscatory rates on [AP&L] and possible subsidization of [AP&L's] wholesale service by [AP&L's] industrial customers or other retail customers of [AP&L] over whom we have no jurisdiction. Moreover, Petitioners' proposal would subordinate our authority to set wholesale rates to the retail ratemaking jurisdiction of the state commission. (Petition, App. D, pp. 37a-38a)

Conway's petition for rehearing of this order was denied by the Commission on December 5, 1973 (Petition, App. E).

3. Opinion of the Court of Appeals

Conway petitioned the Court of Appeals for the District of Columbia Circuit to review the Commission's orders of July 31, 1973, October 29, 1973, and December 5, 1973.

Upon review, the court of appeals rejected the Commission's position that it lacked the necessary jurisdiction to adjudicate an allegation of a "price squeeze" between jurisdictional wholesale rates and nonjurisdictional retail rates and remanded the case for further proceedings.

Although the court recognized that the Commission's wholesale ratemaking jurisdiction was narrowly defined under §205(b) to ensure that the Commission would never interfere with the exclusive right of a state regulatory agency to set rates for retail sales of electricity within its state boundaries, the court, nevertheless, held that §205(d) authorizes the Commission to remedy a proven price squeeze between a rate subject to its jurisdiction and a rate not subject to its jurisdiction. The court reasoned that the language of §205(b) was only intended to mean that the Commission was required to address its sanction to the jurisdictional wholesale rate. The court gave predominant weight to an assumption that if the draftsmen of the Act had not intended to give the Commission jurisdiction over a cross-jurisdictional price squeeze, they could have done so by prohibiting "the maintenance of unreasonable differences in rates 'between classes of service subject to the jurisdiction of the Commission.' " (Petition, App. A, p. 15a) The court supported its statutory interpretation primarily by reference to this Court's prior decisions in *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635 (1945), and *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747 (1973).

SUMMARY OF ARGUMENT

The court below, while accepting the fact that the Commission has no authority to review or modify AP&L's state regulated electric retail rates, found that those provisions of the Federal Power Act vesting the Commission with authority to regulate interstate wholesale rates also contain the implicit duty to adjudicate an allegation of a price squeeze between AP&L's interstate wholesale rates and its state regulated retail rates. No such duty can be inferred from the statutory language of the Federal Power Act, or from its legislative history. The Act was narrowly drawn to protect state regulated electric retail rates from modification by federal authority notwithstanding allegations that the retail rate may have been set well above or below the level which would be deemed just and reasonable by the Federal Power Commission under federal ratemaking principles and concepts.

The court's decision would require the Commission to act contrary to its ratemaking responsibility to set wholesale rates on the basis of wholesale costs without regard to retail rate levels. This responsibility emanates from the letter and intent of the Federal Power Act and has been followed without deviation by the Federal Power Commission since its inception. Moreover, the decisions of this Court upon which the court below purported to support its aberrant statutory construction are clearly unpersuasive. Accordingly, AP&L submits that there is simply no rational basis for overturning the Commission's own interpretation of its limited statutory mandate in the ratemaking area.

ARGUMENT

I. THE COMMISSION HAS NO AUTHORITY UNDER THE FEDERAL POWER ACT TO ADJUDICATE A CLAIM OF DISCRIMINATION BETWEEN A JURISDICTIONAL WHOLESALE RATE AND A NONJURISDICTIONAL RETAIL RATE.

The court below held that the Commission has jurisdiction to remedy alleged discrimination between jurisdictional wholesale rates and nonjurisdictional retail rates. AP&L submits that the language of §§205 and 206 of the Act, the pertinent legislative history and the Commission's consistent interpretation of its authority [7] clearly demonstrate that the court of appeals committed reversible error.

A. Under §§205(b) and 206(a), the Commission's authority to review and modify rates is limited to interstate wholesale rates.

Section 205(b) of the Federal Power Act prohibits any public utility "with respect to any transmission or sale subject to the jurisdiction of the Commission" from maintaining "any unreasonable difference in rates, charges, services, facilities, or in any other respect, either as between localities or as between classes of service." Section 206(a) requires the Commission to determine a just and reasonable rate whenever it, after a hearing, has found that the rate demanded "by any public utility for

[7] *Alabama Electric Coop.* v. *Alabama Power Co.*, 38 F.P.C. 962 (1967); *St. Michaels Utilities Comm'n* v. *Eastern Shore Public Service Co.*, 35 F.P.C. 591 (1966), *petition to review denied sub nom St. Michaels Utilities Comm'n* v. *F.P.C.*, 377 F.2d 912 (4th Cir. 1967); *Southwestern Public Service Co.*, 33 F.P.C. 343 (1965); *Jaspan* v. *Philadelphia Electric Co.*, 1 F.P.C. 561 (1938).

any transmission or sale *subject to the jurisdiction of the Commission*. . . is unjust, unreasonable, unduly discriminatory or preferential."[8] (Emphasis added)

Under these sections, the Commission's authority to review and modify electric rates is clearly limited by the words "subject to the jurisdiction of the Commission." The Act's declaration of policy states in §201(a) that ". . . Federal regulation of . . . the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." (16 U.S.C. §824(a)) Furthermore, §201(b) states that "[t]he provisions of this Part shall apply to the . . . sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy . . . ." (16 U.S.C. §824(b)) Thus, by

[8] Section 205(b) provides in full:

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. (16 U.S.C. §824d(b))

Section 206(a) provides in full:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. (16 U.S.C.§824e(a))

referencing §§205(b) and 206(a) to the Act's declaration of policy the draftsmen provided a safeguard against the possibility that the Commission would usurp state authority to approve rates for retail sales of electricity on the ground that it was necessary to eradicate rate discrimination occurring across the jurisdictional line of demarcation.

Pertinent portions of the legislative history preceding passage of the Act confirm beyond all doubt that its draftsmen and sponsors intended to insulate state regulated electric retail rates from modification by the Federal Power Commission and that wholesale rates were to be determined without regard to retail rates. The following dialogue between Representative Pettengill of the House Committee on Interstate and Foreign Commerce and Mr. Dozier Devane, one of the draftsmen of the 1935 Federal Power Act, occurred during the Committee hearings on the Act:[9]

> Mr. Pettengill: You say this bill gives the Power Commission jurisdiction over wholesale energy in interstate transmission.
>
> Mr. Devane: Yes.
>
> Mr. Pettengill: Suppose the retail rate or wholesale rates in intrastate are fixed by the State Commission, and were so low that for the company to exist it had to charge exhorbitant rates for its wholesale interstate business. Then would not the doctrine of the Shreveport case[10] apply?

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[9]Hearings before the House Interstate and Foreign Commerce Committee on H.R. 5423, 74th Cong., 1st Sess., March 8, 1935, p. 503.

[10]*Houston, East and West Texas Ry.* v. *United States*, 234 U.S. 342 (1914).

> Mr. Devane: No Sir.
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> • • • • •
>
> Mr. Devane: The interstate rate should be determined upon its reasonableness, its reasonableness without regard to what the intrastate rate is.
>
> Mr. Pettengill: That is what it should be.
>
> Mr. Devane: And the intrastate rate should be determined upon its reasonableness.

Similarly, Representative Cole, one of the sponsors of the statute in its final form, commented on the House floor as to the assiduous efforts of the Committee to separate the Commission's interstate wholesale ratemaking authority from the retail ratemaking authority of the state commission:

> As to the jurisdiction of the States and State commissions, I doubt if any State commission or State officials familiar with the bill as it is now before you will say that the jurisdiction of the States has not been safeguarded and protected in a fair and lawful way. In doing so we have tried—and I think successfully—to avoid the injection into the Federal control, which this title confers, the extension thereof into intrastate activities in the way that the Shreveport case might permit. (79 Cong. Rec. 10384, June 28, 1935).

B. The decision below is premised on an illogical interpretation of §§205(b) and 206(a).

Despite the Federal Power Act's unambiguous statutory language and legislative history, the court of appeals concluded that a "common sense reading of the statutory language reveals no requirement that both rates involved in a pattern of discrimination [subject to the Commission's remedial powers under §§205(b) and 206(a)] fall

within the jurisdiction of the Commission." This conclusion is premised on the erroneous assumption that if Congress had intended to limit the reach of §205(b) to discrimination between jurisdictional classes, it would have referred to "classes of service subject to the jurisdiction of the Commission" instead of "classes of service." (Petition, App. A, p. 15a)

Following the court's logic, Congress would have had to have written §205(b) as follows:

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, . . . maintain any unreasonable difference in rates . . . between classes of service *subject to the jurisdiction of the Commission*. (Emphasized language added)

The additional "subject to" phrase at the end of the section would obviously be redundant, however, since §205(b) already limits the Commission's jurisdiction "to any transmission or sale subject to the jurisdiction of the Commission."[11] In seeking to justify its conclusion, the court stated that "[a] fair interpretation of the statute as it is drafted is . . . that any sanction imposed by the FPC to remedy an anticompetitive practice is to be addressed to the jurisdictional rate . . ." (Petition, App. A, p. 16a) The court has, in other words, inferred from the absence of a "subject to" phrase at the end of the section that Congress was requiring the Commission to remedy

[11]At one point in the Committee hearings, Mr. Devane remarked in reference to certain amendments, proposed by the National Association of Railroad and Public Utility Commissioners, to the draft then being considered, "[w]here they propose to put in every paragraph 'subject to the jurisdiction of the Commission,' that is pure draftsmanship. That does not make any difference, if you want to do that. They want to amend every paragraph and every section, and every subsection, by the use of those words." Hearings before the House Interstate and Foreign Commerce Committee on H.R. 5423, 74th Cong., 1st Sess., 1935, p. 2143.

unreasonable differences between rates subject to its jurisdiction and rates not subject to its jurisdiction and, at the same time, requiring that the sanction always be addressed to the jurisdictional rate.[12]

Since Congress did not give the Federal Power Commission authority to modify state regulated retail rates, the inevitable result which flows from the court of appeals' decision is that in some cases the Commission would be required to subordinate its statutory authority to regulate interstate wholesale rates to the authority of other regulatory commissions. The court would, in effect, have the Commission attempt to eradicate an alleged price squeeze between wholesale rates and retail rates by simply lowering the wholesale rate below the point found necessary under the guidelines established pursuant to the Federal Power Act and this Court in *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

As this Court has said with regard to the Natural Gas Act, also administered by the Federal Power Commission, "a regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law." *U.G.I.* v. *Continental Oil Co.*, 381 U.S. 392, 400 (1965). More recently, in *Corporation Comm'n* v. *F.P.C.*, 415 U.S. 961 (1974), the

[12]It should be emphasized that a mere difference in rates between different classes of service is not *per se* discriminatory, since customer classes with different load characteristics are obviously not entitled to equivalent rates. *St. Michaels Utilities Comm'n* v. *F.P.C.* 377 F.2d 912, 915 (4th Cir. 1967). Similarly, under the Robinson-Patman Act, for example, price "differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which commodities are to such purchasers sold or delivered" are not prohibited, 15 U.S.C. §13.

Court affirmed a ruling of the United States District Court for the Western District of Oklahoma that the setting of a statewide minimum price for wellhead gas by the state commission conflicted with the jurisdiction of the Federal Power Commission under the Natural Gas Act and that the federal authority vested in the Commission over wholesale rates for natural gas governed under the supremacy clause of the Constitution.

Moreover, the court's opinion greatly oversimplifies the problems that would confront both the Commission and interstate electric companies if the Commission were charged with the responsibility of resolving asserted price squeezes arising from differences in wholesale and retail rates. If, in fact, there was a price squeeze of the type alleged by Conway in the Commission proceedings below, based on asserted differences between AP&L's wholesale rates and its retail industrial rates and the customers alleged inability to match AP&L's retail industrial rates, such a differential could be created in several ways through the interaction of three different rates: (1) the electric company's interstate wholesale rate; (2) the electric company's retail industrial rate; and (3) the retail rate designs of the electric company's wholesale customers. Since only the first of these three rates is subject to the jurisdiction of the Commission, the customers may independently create a price squeeze, either inadvertently or intentionally, through the levels and design of their own retail rates (especially their industrial rates). This is particularly apparent in the case of the municipal wholesale customers, whose rates to its customers are not regulated by the Federal Power Commission, the Arkansas Public Service Commission, or any other outside regulatory agency.

Furthermore, the ratemaking principles adopted by the Federal Power Commission may vary substantially from those utilized by the state commissions, and no two jurisdictions are going to have identical objectives or policies with regard to regulation.[13] Conflicts in policy in ratemaking procedures can, and have arisen, over methods of determining rate base, allocation of costs, items of expense to be allowed or disallowed, accounting methods and other matters. (See *Arkansas Power & Light Co.* v. *F.P.C.*, 185 F.2d 751 (1950), *cert. denied*, 341 U.S. 909 (1951).

Since Congress did not give the Federal Power Commission authority to modify state regulated retail rates, or the retail rates of the wholesale customers, AP&L submits that the rates established by one jurisdiction cannot be used in determining the appropriate level of rates in the other. The determination of the justness and reasonableness of the wholesale rates of a public utility is to be made by the Commission, applying the provisions of the Federal Power Act, on the basis of operating expenses and capital costs, and not on the basis of the regulatory standards of state commissions. *Cf. F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. at 603, *supra*.

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[13]A state commission, unlike the Federal Power Commission, could be motivated by a policy of encouraging industrial development within the state by fixing a lower retail rate for industrial customers.

II. THE COURT OF APPEALS RELIED IMPROPERLY ON PRIOR DECISIONS OF THIS COURT TO SUPPORT ITS ERRONEOUS INTERPRETATION OF THE FEDERAL POWER ACT.

Having declined to give the words of jurisdictional limitation in §§205(b) and 206(a) their plain meaning and erroneously concluding that the Commission has the power to address claims of discrimination between jurisdictional and nonjurisdictional rates, the court of appeals sought to bolster its conclusion by reliance on this Court's decisions in *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635 (1945), and *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747 (1973), even though the court recognized that the two cases are "distinguishable" (Petition, App. A, pp.12a, 18a). In actuality, neither case lends any weight to the court's reasoning.

As to the *Panhandle* case, the court expressed the view that the "underlying principle is one that permits the FPC to consider matters which would be completely nonjurisdictional taken by themselves, but are appropriate for consideration where germane to the meaningful execution of a jurisdictional function." (Petition, App. A, p.18a) On the contrary, the precise holding of *Panhandle* is inapposite to the issue at hand.[14] *Panhandle* dealt with a Commission investigation under §5(a) of the Natural Gas Act (15 U.S.C. §717d(a)) following a complaint that the pipeline's interstate wholesale rates were

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[14]As will be explained, *infra* at p. 19, *Panhandle* dealt with the Commission's procedures for allocating costs and not with an allegation of price discrimination.

unjust and unreasonable.[15] Since Panhandle's nonjurisdictional business was insignificant in comparison with its interstate wholesale business, the Commission did not consider it necessary to make an allocation of costs between the regulated and unregulated phases of the company's operations, as would normally be done in a proceeding involving a rate change by a regulated utility with a substantial degree of nonjurisdictional business. Instead of attempting to segregate costs and properties between the jurisdictional and nonjurisdictional classes of service, an attempt which would have been "theoretical" and "impractical" (324 U.S. at 646) in view of the unified character of the business and the fact that plant devoted exclusively to the nonjurisdictional business was less than one-sixth of one percent of the company's entire plant investment, the Commission adopted the more practical procedure of allocating all of the earnings from the entire business in excess of a 6½ percent return to the interstate

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[15]Section 5(a) of the Natural Gas Act is analogous to §206(a) of the Federal Power Act and states:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint . . . shall find that *any rate* . . . collected by any natural gas company in connection with any transportation or sale of natural gas, *subject to the jurisdiction of the Commission, . . . is unjust, unreasonable, unduly discriminatory, or preferential,* the Commission shall determine the just and reasonable rate . . . and shall fix the same by order . . . . (15 U.S.C. §717d(a)) (Emphasis added)

The meaning of "subject to the jurisdiction of the Commission" is set out in §1(b) of the Natural Gas Act:

> The provisions of this chapter shall apply . . . to the *sale in interstate commerce of natural gas for resale* for ultimate consumption . . . but shall not apply to any other . . . sale of natural gas . . . . (15 U.S.C. §717(b)) (Emphasis added)

wholesale business (324 U.S. at 642). By this method, the Commission determined that Panhandle's jurisdictional rates were excessive and should be lowered.

This Court upheld the Commission's method in light of the "exceptional circumstances" of the case (324 U.S. at 647), but stated:

> We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both. *Otherwise the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business and the Commission would transgress the jurisdictional lines which Congress wrote into the Act.* (324 U.S. at 641, 642) (Emphasis added)

The Court then went on to say that §5(a), which as stated above is analogous in pertinent part to §206(a) of the Federal Power Act, "does not of course give the Commission authority to disregard the jurisdictional lines which Congress has drawn between interstate wholesale sales and direct industrial sales so as to level the profits between the two classes of business." (324 U.S. at 647)

AP&L's operations, unlike Panhandle's operations in 1945, involve a significant degree of nonjurisdictional business; accordingly, in compliance with the Commission's regulations, AP&L filed allocated cost of service studies detailing the costs associated with its jurisdictional business. The jurisdictional and nonjurisdictional aspects of AP&L's operations are easily discernible and, thus, consideration of the Company's retail rates is not germane to the execution of the Commission's jurisdictional function of establishing a just and reasonable level for the interstate wholesale rates.

In *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945), a decision rendered on the same day as *Panhandle*, this Court again emphasized that the basic problem in a rate investigation proceeding before the Commission is to allocate to each class of business its fair share of the costs and then, if the revenue from the jurisdictional business exceeds the costs attributable to that phase of the business, the jurisdictional rates could be lowered. Significantly, with respect to the determination of the proper wholesale rate, the Court stated:

> It is of course immaterial that the revenues from the intrastate sales or the direct industrial sales may exceed their costs, since the authority to regulate those phases of the business is lacking. (324 U.S. at 588)

Further, as the concurring opinion stated, "[i]t is true that the Natural Gas Act forbids discrimination only as between regulated rates and does not forbid discrimination between the regulated and nonregulated ones." (324 U.S. at 615) The Commission's authority and jurisdiction under the Federal Power Act are no broader.

Implicit in the *Panhandle* and *Colorado Interstate* cases is the fundamental concept that the Commission must set the level of a regulated utility's interstate wholesale rates on the basis of the cost of serving the wholesale customers, as demonstrated by the allocated cost of service studies filed by the utility and subjected to administrative scrutiny. This Court's landmark decision in *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), fully recognizes that the Commission has the responsibility in the rate reviewing area to determine the rate level necessary to recover the utility's jurisdictional costs and produce a return sufficient to maintain its financial integrity. *Cf. Bluefield Water Works and Improvement Comm'n* v. *Public Service Comm'n*, 262 U.S. 679 (1923). This obligation could

be frustrated to the detriment of AP&L and numerous other electric companies with wholesale business if the Commission were also required to set wholesale rates on the basis of determinations made by state regulatory bodies.

The court of appeals' reliance on the *Gulf States* case, *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747 (1973), is equally misplaced. As does the Commission itself, AP&L recognizes that *Gulf States* stands for the proposition that the Commission should consider "in appropriate circumstances the anticompetitive effects of regulated aspects of interstate utility operations." (411 U.S. at 758) The presence or absence of "appropriate circumstances," however, depends in substantial part upon what statutory function the Commission is performing.[16]

In *Gulf States* the situation was quite different than here, since there the Commission was not exercising its limited ratemaking authority but was instead acting under §204, 16 U.S.C. §824c, which relates to the issuance of securities by a public utility.[17] This section differs radically from §§205 and 206, as subsection (f) specifically states that "[t]he provisions of this section shall not extend to a public utility organized and operating in a state under the laws of which its security issues are

[16]As the Court indicated in *Gulf States*, the Commission's scope of authority to consider antitrust allegations under one section of the Federal Power Act is not "determinative" of its scope of authority under another (411 U.S. at 757).

[17]In the Commission's §204 proceeding, certain cities had protested Gulf States' application for approval to issue the securities, alleging that the proceeds from the proposed bonds would be used to finance anticompetitive activities directed against them (411 U.S. at 751).

regulated by a State Commission." (16 U.S.C. §824c(f)) Consequently, under §204 there is no possibility of federal and state collision as there would be under §§205 and 206 if the decision below is upheld. More importantly, the Commission's scope of review under §204 is much broader than its scope of review under the ratemaking sections of the Act and was certainly intended to include antitrust standards.[18] As the Court noted specifically in *Gulf States*:

> The mandate that §204 of the Federal Power Act, 16 U.S.C. § 824c, imposes upon the Commission is a broad and impressive one. Section 204(a) empowers the commission to authorize the issue of a security by a public utility *only* "if it finds that such issue . . . is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest." This requires the Commission to inquire into and to be satisfied with the purposes of the issue and its lawfulness. And even if its "object" is lawful, the necessary inquiry is not ended, for, in addition, the object must be "compatible with the public interest." (411 U.S. at 756)

Accordingly, while the "appropriate circumstances" to consider "anticompetitive effects" are present under §204 by virtue of the broad statutory mandate within that section, the Commission's refusal to adjudicate similar claims under §§205 and 206 is not inconsistent in any way with the *Gulf States* case since the "appropriate circumstances" are not present under those sections.

[18]The Court observed that §204 of the Federal Power Act "was modeled upon §20a of the Interstate Commerce Act" which was expressly designed to give the Interstate Commerce Commission broad public interest responsibility under its authority to approve security issues (411 U.S. at 760). Congress' intent underlying §204 is, therefore, in direct opposition to its intent underlying §§205 and 206 which was to prevent the Comission from exercising ratemaking jurisdiction coextensive with that of the Interstate Commerce Commission.

In summary, neither the *Panhandle* decision, nor the *Gulf States* decision, justifies the court's restructuring of the Commission's own interpretation of its administrative responsibilities. As this Court said in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.

Thus, reviewing courts have no authority to second-guess the Commission's accommodation of antitrust and other regulatory policies. "[S]triking the balance is for the Commission" (*Northern Lines Merger Cases*, 396 U.S. 491, 514 (1970)), and is a judgment which "the agency alone is authorized to make" (*Gulf States Utilities Co.* v. *F.P.C.*, *supra*, at 764, quoting *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should reverse the decision reached by the court of appeals, and find that the Federal Power Commission does not have the statutory authority under the Federal Power Act to adjudicate allegations of discrimination between jurisdictional interstate wholesale rates and nonjurisdictional retail rates for the sale of electricity.

Respectfully submitted,

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APPENDIX

The Federal Power Act, June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. §§717a-825r, provides in pertinent part:

Section 201, 16 U.S.C. §824:

DECLARATION OF POLICY—APPLICATION OF PART—DEFINITIONS

(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce,

or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Section 205, 15 U.S.C. §824d:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the

jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect

without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its

decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 206, 16 U.S.C. §824e:

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

The Natural Gas Act, June 21, 1938, 52 Stat. 821-33, as amended, 15 U.S.C. §§717-717w, provides in pertinent part:

Section 1(b), 15 U.S.C. §717(b):

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 5(a), 15 U.S.C. §717d(a):

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission,

unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

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No. 75-342

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On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR RESPONDENTS CONWAY CORPORATION, ET AL.

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No. 75-342

IN THE

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OCTOBER TERM, 1975

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v.

CONWAY CORPORATION, ET AL., RESPONDENTS

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENTS CONWAY CORPORATION, ET AL.

STATUTE INVOLVED

Sections 19, 20, 201, 205, 206 and 209 of the Federal Power Act[1], 16 U.S.C. 812, 813, 824, 824d, 824e, and 824h are set forth in the Appendix to this brief, *infra*, pp. 45-52.

[1] Sometimes referred to as "the Act".

QUESTION PRESENTED

Whether the court below correctly determined that the Federal Power Commission[2] erred in its determination that it lacked the power, in ruling on a proposed rate increase to wholesale customers, with which the filing utility competed directly at retail, to remedy the anticompetitive impact caused by the alleged intentional "price squeeze" or discrimination imposed when the utility raised its wholesale rates substantially above those which it charged at retail.

STATEMENT OF THE CASE

I. Before The F.P.C.

Respondents, the Conway Corporation (a corporation owning and operating the electric system of the City of Conway, Arkansas), Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, and the City of West Memphis, are all municipally owned electric systems in the State of Arkansas. Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc. are cooperative electric systems in Arkansas financed by the Rural Electrification Administration.[3] Each purchases all, or a major portion of, the electricity it sells to retail customers at wholesale from Arkansas Power & Light Company ("AP&L" or "the Company"), a subsidiary of Middle South Utilities, Inc., a public utility holding company under the Public Utility Holding Company Act of 1935. Each is bounded, in whole or in part, by territory served at retail directly by AP&L.

On June 1, 1973,[4] AP&L filed a wholesale rate increase against petitioners (and several others) with the FPC which, according to AP&L's own filing, would increase rates to the Cities by 22.6% and to the Cooperatives by 34.9% (exclusive of fuel clause revenues).[5]

The customers filed a timely Protest, Motion to Reject and Petition to Intervene on June 28, 1973, and corrected certain areas therein by a Motion for Leave to Substitute and Add on July 2.[6] As here relevant, customers noted that so far as could be determined, the sole purpose of the rate increase was to attempt to squeeze the customers, or some of them, out of competition, and to make them more susceptible to the persistent efforts of the Company to take over the publicly owned systems of the state (JA6). Arkansas is a state which was then (and is now) vigorously seeking new industry. The accompanying payroll and other benefits of new industry can, the customers stated, be vitally important to a community. Customers and AP&L have both actively sought to encourage new industrial load, and customers have generally sought to match AP&L tariffs for such loads, which they had successfully been able to do until this filing (JA6-7). Customers demonstrated that even on an incremental basis, they would not be able to match tariffs for such retail customers with AP&L without paying more, simply for purchased power, than they would receive from such retail customers, without any consideration of their own fixed and operating costs (JA7-10). Customers further noted that they had offered not to oppose AP&L's wholesale rate increase if AP&L would agree to increase its industrial retail rates to maintain the historic comparative retail-wholesale competitive situation but that AP&L had declined that offer (JA7).

Customers went into considerable detail as to the deficiencies of AP&L's proposed cost of service, and the degree to which AP&L appeared to be overreaching simply to give a

---

[2] Sometimes herein "the FPC" or "the Commission".

[3] Respondents will be sometimes referred to, for convenience, as "the customers".

[4] While not directly relevant, it may be noted that the court below used a date of filing of May 31, 1973. 510 F.2d at 1266, Petition Appendix 2. That was the date used by customers in their pleadings below, and was the date stated in the Commission's Notice of Proposed Changes in Rates and Charges issued in the underlying docket (E-8250) on June 15, 1973. as will be apparent, the real issues are numerous enough, so we acquiesce in the June 1 date utilized by the Commission herein for consistency.

[5] The exact percentage increase depends, of course, upon the base utilized.

[6] The corrected Protest, etc., is reproduced in the Joint appendix at JA 4-25.

rationale for raising its competitors' rates (JA10 *et. seq.*).

Since the wholesale and retail large industrial tariffs had historically had the same demand and energy blocks except for a $2,000 lower cost to the wholesale customers in the first monthly demand block, the customers asserted that the filing by AP&L to raise its wholesale rates to its competitors, while refusing to raise its large industrial rates, required explanation (JA18), and concluded, as here relevant:

> ". . . since the company has filed a plainly discriminatory rate against the single class of customer which it has historically attempted to drive out of business, without justification on any ordinary cost of service basis, the filing should be rejected out of hand, with leave for the company to file again a) if and when it files to increase its retail industrial rates, and b) if and when it can justify an increase to the wholesale customers on a single year recent 'test year'.

In a response filed July 20, 1973, AP&L objected, as here relevant, to the calculations made by the customers on the price squeeze issue, and suggested that it would prove at the hearing that there was no price squeeze (JA26-27). Thus, it objected to the motion by the customers to reject, and stated (JA26) "the issues raised merely indicate the appropriateness of a hearing so that all parties will have an opportunity to support their positions."

On July 31, 1973, the Commission issued an Order (JA34) accepting and suspending the proposed tariff sheets. In pertinent part, that Order provided (JA35):

> "Notice of filing was issued on June 15, 1973, with protests and petitions to intervene due on or before June 28, 1973. A Protest, Motion to Reject, and Petitions to Intervene of Publicly Owned Wholesale Customers [footnote omitted] (Customers) was timely filed June 28, 1973. In support of its motion to reject, Customers first allege that APLC's [sic] participates in anticompetitive activity and that the proposed rate increase would 'squeeze' Customers out of competition with respect to sales to industrial customers.
>
> By order issued May 31, 1973, in *Indiana and Michigan Electric Company* Docket No. E-7740 we set minimum standards for those who would raise anticompetitive issues. These standards

> are that the petition to intervene must clearly specify 1) the facts relied upon, 2) the anticompetitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct. Our review of Customers' petition to reject or intervene indicates that it fails to specify the relief which is within this Commission's authority to direct. Accordingly, we shall limit Customers' participation in this proceeding to matters other than the alleged anticompetitive activities. The action is without prejudice to Customer's right to file an appropriate amended petition which sets forth relief for the alleged anti-competitive conduct that is within this Commission's authority to direct."

In response to that Order, and the suggestion therein that the customers file an appropriate amended petition, on August 22, 1973, customers filed their Amended Petition (JA43 *et. seq.*). That Amended Petition called the Commission's attention to the representations made by it to this Court in *Gulf States Utilities Company v. FPC* (JA44) with respect to anticompetitive allegations made under Sections 205 and 206 of the Federal Power Act; incorporated by reference the earlier Protest, Motion to Reject, and Petition to Intervene . . ., and stated:

> "As Petitions have demonstrated, this rate increase filing appears to be an attempt to institute a 'price squeeze' to the end of putting Petitioners out of business as independent members of the electric power industry. In addition, as we have shown, the rate at which AP&L proposes to charge Petitioners is unduly discriminatory vis-a-vis the Company's retail industrial rates, which have historically been on a basis similarly structured, but somewhat higher than the wholesale for resale rates of AP&L"

After quoting from the opinion of this Court in *Gulf States Utilities Company v. FPC*, 411 U.S. 747 (1973), the customers noted (JA44-45) that:

> ". . . whatever else the language may mean, there can be no question that it directs this Commission to eliminate rate structures which are anticompetitive by reason of a price squeeze.
>
> "In these circumstances, and without waiving any other relief heretofore sought, Petitioners request this Commission to reduce the proposed rates filed by AP&L to eliminate the

anticompetitive price squeeze, within its authority under Sections 205 and 206."

On October 29, 1973, the Commission issued an Order Denying Amended Petition to Intervene and Clarifying Prior Order (JA82 *et. seq.*). In that Order, the Commission made clear that it would refuse to consider the "price squeeze" or discrimination issue (JA53-54):

> "The Relief sought by Petitioners is beyond the authority granted to us under the Federal Power Act. Under the Federal Power Act this Commission is charged with the responsibility for reviewing rate applications to insure that the rates proposed are just and reasonable . . .
>
> Wholesale rates must recover allocated wholesale costs. Customers' suggested relief is a rate related not to wholesale costs but rather related to APLC's industrial rates. However, APLC's industrial-rate level and the accounting and the rate making principles underlying that rate level is under the sole jurisdiction of the state commission and not the Federal Power Commission. We have no jurisdiction over APLC's industrial rates, and we do not choose to open this hearing to an examination of those rates. Such an action would require a detailed analysis of APLC's retail cost of service and would result in this Commission interjecting itself into an area in which it has no jurisdiction.
>
> Petitioner's allegation of 'price squeeze' in and of itself, does not constitute anticompetitive behavior by APLC given the fact that any wholesale rates we approve must be based on allocated wholesale costs. To approve rates which recover less than those costs would produce grave consequences, since such action would be tantamount to imposing confiscatory rates on APLC and possible subsidization of APLC's wholesale service by APLC's industrial customers or other retail customers of APLC over whom we have no jurisdiction. Moreover, Petitioners' proposal would subordinate our authority to set wholesale rates to the retail ratemaking jurisdiction of the state commission.
>
> Customers' Amended Petition cites language in *Gulf States Utilities Co. v. FPC, et al.*, [Footnote omitted] which it asserts directs the Commission to eliminate rate structures which are anticompetitive by reason of a price squeeze. However, as we stated in our order in *Southern California Edison Company*, Docket No. E-8176, issued on September 21, 1973, the *Gulf States* opinion clearly states that its ruling is not to be

> interpreted as saying that the Commission must always hold a hearing on the antitrust issue [Footnote omitted]. The Supreme Court also noted without objection that the Court of Appeals had observed that the summary disposition of the antitrust argument in a proceeding might be acceptable providing such disposition does not go unexplained."

On November 5, 1973, customers petitioned for rehearing of the Order of October 29 (JA56, *et seq.*).[7] That petition for rehearing noted that (JA56):

> ". . . this Commission appears to have determined that it will refuse to consider an intentional, voluntary, and conscious effort of a wholesale supplier of electric energy to 1) charge wholesale customers whose rates are set by this Commission substantially more than is charged retail customers with similar characteristics whose rates the Company has voluntarily refused even to seek to increase, in violation of the anti-discrimination provisions of Sections 205(b) and 206(a) of the Federal Power Act, and 2) alter its historic wholesale-retail price structure in such a way as to preclude its wholesale customers from competing for new retail industrial load of the sort which is and historically has been vigorously sought by both the company and petitioners [Footnote omitted] in violation of the Sherman and Clayton Acts."

The customers went on to discuss at considerable length the legal errors in the Commission's holding.

On December 5, 1973, the Commission issued its Order Denying Petition for Rehearing on this matter (JA65-67). In that Order, the Commission repeated the rationale of its October 29 Order, and denied the Petition for Rehearing filed by the customers.

On December 6, 1973, the customers filed their petition for review in the court below.

2. The Court Below

On April 4, 1975, the court below entered its opinion and judgment. *Conway Corporation v. FPC*, 510 F.2d 1264 (CADC).[8] As here relevant, the court below discussed the competitive

[7] A petition for rehearing is a jurisdictional requisite for appellate review under Section 313(b) of the Federal Power Act, 16 USC 825*l*(b).

[8] Judges Tamm, Leventhal and MacKinnon.

framework within which the questions raised occurred (at 1268-1269). On the merits, the court examined the teachings of this Court in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973), and the statutory language together with the legislative history of Part II of the Federal Power Act, and unanimously concluded that the Federal Power Commission had ample authority to deal with the discrimination or price squeeze alleged, by action addressed to the wholesale rate subject to the jurisdiction of the Federal Power Commission, without in any way impeding or impinging upon regulation of retail rates by the state commission having jurisdiction of such rates.

3. The Grant of Certiorari

On June 27, 1975, in response to an application for extension of time for filing a petition for a writ of certiorari, the Chief Justice extended the time for filing such a petition to August 2, 1975. On August 1, 1975, in response to an application for a further extension of time within which to file a petition for a writ of certiorari, which requested "that the time within which to file a petition for a writ of certiorari be extended to September 1, 1975.", an order was entered extending the time for filing "to and including September 1, 1975". The Federal Power Commission's petition for a writ of certiorari was docketed in this Court on September 2, 1975.[9] The Petition for a writ of certiorari was granted on November 11, 1975.

SUMMARY OF ARGUMENT

The position urged upon this Court by the Commission is inconsistent with the wording of the Federal Power Act, with the thrust of utility regulation and common law, with the past

[9] It should be noted that customers had opposed one of the several motions by the FPC in the court below for a stay of its mandate on the basis that allowing the mandate to go down would at least allow the customers to engage in the discovery relevant to this issue (denied by the Administrative Law Judge) and adduce testimony for a record for the Commission's decision. Nearly three years after filing of the underlying rate increase, hearings have not yet been completed.

precedents of the Commission, with the teachings of this Court, and with basic notions of accommodation and comity between state and federal interests. Moreover, that position would require constant and otherwise unnecessary law suits, and would interpose federal courts directly into matters long considered subject to the primary jurisdiction of state and federal regulatory agencies. As we demonstrate, there is no reason or basis for a result so devoid of common sense or workability.

The Commission argues to this Court that it has no authority to consider and rectify a discriminatory wholesale rate imposed upon a wholesale customer by its competitor at retail because Congress somehow withheld from it power so to do; that the Commission is directed to fix "just and reasonable" wholesale rates without consideration of discrimination vis-a-vis non-jurisdictional rates[10]; and that an (unspecified) remedy remains for customers in the federal courts. The Commission's argument here, however, though substantially better reasoned than its orders here on review, fails to come to grips with much of the history of public utility regulation in this country. As we shall demonstrate, the competitive situation in which customers here find themselves is one which vitally affects the electric power industry and particularly the wholesale customers the FPC was established to protect. The historic authority to remedy discriminatory treatment of customers of public utilities was one of the major, if not the major, basis for regulation at common law and by state commission, and the same considerations underlying that authority underlie the decisions of the courts under the antitrust law. That authority did not evaporate when the Public Utility Act of 1935 was passed, but was transferred to the Commission. The court remedy proposed by the Commission may be an alternative, but it is not a logical replacement remedy nor, as apparently envisioned, consistent with the interpretation of the Federal Power Act by this and other courts.

[10] The Commission artfully words its argument to imply, but not to state outright, that it has no authority to set *any* rates on other than a "just and reasonable", fully allocated cost basis.

I.
THE STRUCTURE OF THE ELECTRIC UTILITY INDUSTRY

A. The Industry

In recent years, there have been several attempts by scholars and by regulatory agencies with jurisdiction over the electric utility industry to render a more detailed and precise description of this industry. Thus, the FPC in 1964 issued its *National Power Survey* (Government Printing Office, 1964), and in 1971 issued the *1970 National Power Survey* (GPO, 1971). These surveys sought in part, to describe the industry statistically as it was found by the FPC Staff in the years studied. In 1975, the Staff of the Nuclear Regulatory Commission (previously AEC) published an economic analysis of the industry, *Coordination, Competition, and Regulation in the Electric Utility Industry* (NRC Publication, NU REG75/061). In addition, a recent massive study by the Brookings Institution of regulated industry has produced further analyses of the industry, *e.g.*, *Antitrust and the Electric Power Industry*, Leonard W. Weiss, in *Promoting Competition in Regulated Markets* (Brookings Institution, 1975), and *Energy Regulation by the Federal Power Commission*, Bryer and MacAvoy (Brookings Institution, 1974).

From an examination of these sources, it appears that the situation here alleged is by no means atypical. Thus AP&L, a large investor owned utility, covers most of the State of Arkansas. It is, as well, a subsidiary of a public utility holding company, Middle South Utilities, which owns five operating electric companies[11] which are operated and dispatched as a single entity for the best advantage of the group. By far the largest proportion of AP&L's sales are at retail, but it has, as well, the nine wholesale customers here, municipally and

[11] In addition to Arkansas Power & Light Company, these are: Louisiana Power & Light Co. ("LP&L"), New Orleans Public Service, Inc. ("NOPSI"), Mississippi Power & Light Co. ("MP&L"), and Arkansas-Missouri Power Co. ("Ark-Mo").

cooperatively owned.[12] AP&L's retail sales area covers the vast bulk of Arkansas, and, with the exception of a portion of Mississippi County Electric Cooperative territory which is bounded by the retail area of AP&L's corporate sibling Ark-Mo, surrounds each of the customers here.

AP&L is the only source of electric power and energy at wholesale available to its wholesale customers.[13] AP&L owns all, or virtually all, of the electric transmission line in the area of Arkansas in which it exists, and thee is no other source of bulk power and energy presently available to the customers. Nor have the necessary coordination and transmission services been made available by AP&L to allow the customers to cooperate to furnish their own power and energy with any kind of generation that might obtain economies of scale; even if these services were available, lead time for a new fossil fuel generation unit of any size is now asserted to be six to eight years, with nuclear units requiring a yet longer lead time. Moreover, it may be noted that AP&L has long term contracts with its customers to furnish them with substantially all their bulk power supply.

AP&L has in the past, allegedly sought to acquire several of its wholesale customers. Nationally, between 1955 and 1965, 150 municipal utilities were acquired by surrounding larger utilities. Weiss, *op. cit.*, 165. Between 1962 and 1968, the number of municipally and cooperatively owned utilities declined by 58, and the number of smaller investor owned utilities declined by some 75. *1970 National Power Survey*, *supra*, at I-2-7. Thus it seems clear that the concerns expressed by customers here are not without basis. Moreover, as Professor Meeks has pointed out, as noted by the court below[14] (at 1268), in "Concentration in the Electric Power Industry: The Impact of Antitrust Policy," 72 Colum. L. Rev. 64, 78, (1972):

[12] According to the data originally filed by AP&L in the underlying docket, its wholesale customers *in toto*, accounted for 7.575% of the energy sold by it in the test year chosen by it. Included in that figure is some energy sold to other wholesale customers than the nine here.

[13] With one exception—Mississippi County—which is connected, as well, to transmission lines of AP&L's affiliate Ark-Mo in certain areas.

[14] And as cited with approval by this Court in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1973).

> "To illustrate, assume that a municipal system is buying all or most of its power from a neighboring private system. There exists between the two an indirect, but very real competition to serve their respective areas since the state commission or the voting public might well decide to allow the system that furnished the cheaper power to serve both areas. Unless the municipality has access to alternative sources of economical power . . . the neighboring system can virtually control the performance of the municipal system through its control over the wholesale price of power. . . . Such control by selling systems is probably very common and very effective, primarily because of the almost universal control over transmission by the dominant selling system in an area. This kind of 'unfair' competition is usually directed at municipals and cooperatives but also occasionally at small private systems, particularly when the seller is seeking to absorb the smaller system by merger."

This competition is especially severe if it reaches the stage where a purchasing publicly owned utility is forced to a choice of either 1) raising its industrial rates to a level higher than those in the surrounding area served by its wholesale supplier or 2) raising its residential rates to a level higher than those in the surrounding areas served by its wholesale supplier. If it adopts the first choice it may inhibit or stop industrial growth within its city or service limits, thus inhibiting or stopping additional jobs, tax base, and the general other effects, assumed to be beneficial, of additional jobs and payroll for the city. If it adopts the latter choice, experience has shown that it will not be long before a campaign begins to have the distribution utility sold to the supplier.

Obviously, if the differences in retail rates were a reflection of differences in costs, responsible city officials would have to give serious consideration to a proposal to sell a distribution utility that could not compete with its supplier as to retail rates. But where, as here, the differences are assumed to be a result of the decision of the supplying utility to discriminate against its wholesale customers to force a "price squeeze", the question is whether there is a proper remedy that will allow the customers properly to reflect their own economics.

B. Rate Setting

The Commission seeks to leave the impression in its brief that electric rate regulation is not only precise but simple—a matter of finding the costs and adding them up in order to reach a rate appropriate for the service rendered. If this were so, of course, there would be little chance for a price squeeze to develop unless, as the Commission persists in here asserting, the Company had depressed its retail rates. But rate setting is much more complicated and sophisticated than one would infer from the Commission's presentation here, as the court below, referring (at 1274) to this Court's exposition in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951), recognized. AP&L is regulated at both the retail level (by the Arkansas Public Service Commission) and at the wholesale level (by the FPC). As AP&L recognizes (Brief, p. 17) a price squeeze can occur even if both jurisdictions actually did set rates in accordance with their own procedures. For example, policy decisions as to rate of return, treatment of taxes, *e.g.* "normalization" of certain taxes, allowances for funds used during construction, and selection of test year cost figures are among the major areas where Commission policy plays a far greater role than incurred costs in the determination of the rates ultimately allowed. For example, in 1973, the Commission moved to set rates based on projected future "test years" in which the cost data are estimated by the filing utility. Order 487, 50 FPC 125 (1973), rehearing denied 50 FPC 736 (1973). It is significant to note that in its order on rehearing, the FPC answered the contention that the use of the "future test period" would facilitate price squeezes against wholesale customers by asserting that "such an issue, if raised by a filing, cannot be dealt with summarily in a rule making and would require development at an evidentiary hearing." 50 FPC at 738.[15] In addition, the Commission has taken various steps toward allowing the utilization of "construction work in progress" in rate base, "normalization" of certain taxes, and varying other tax

[15] In each of the instances in which such a price squeeze has since been asserted, the Commission has refused to consider such evidence.

treatments. Each of these changes would increase the total rate that could be "justified" by an FPC proceeding, not because of an increase in costs, but because of FPC policy. There is also the problem of allocation between wholesale and retail costs and rate base. Here, for example, AP&L justified its rate when filed, in part, on the basis of an allocation method never before adopted by the FPC, which substantially increased the rates to the wholesale customers, and these customers are still paying on the basis of such an allocation.

Moreover, the FPC has, for several years, appeared to view its function as "taking the lead" in raising rates for electric utilities. See, *e.g.*, "Public Policy Innovations for the Electric Utility Industry, Remarks of Chairman Nassikas Before a Meeting of State Regulatory Commissioners and Federal Officials," September 11, 1974.[16] The FPC has pointedly, and repeatedly, attempted to change by its "leadership" not only its own methods of setting rates in ways designed to increase rates, but those of the states.

Initially, of course, the matter of rates and conditions of service is left to the seller and buyer to work out by agreement if possible. *E.g., FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1958); *Richmond Power & Light of the City of Richmond,*

[16] Indeed, the Remarks of Chairman Nassikas were delivered at a meeting with state regulators convened by Treasury Secretary Simon together with Chairman Nassikas. Secretary Simon was quoted by the most authoritative record of the industry, *Electrical Week* (McGraw Hill, Sept. 16, 1974) as telling the state regulators that "a good part of your challenge" was raising rates, as did the then Administration energy chief, John Sawhill. According to his released text, Commissioner Nassikas urged "very definite steps . . ." (at p. 9) for regulatory commissioners, including 1) the possible use of construction work in progress in rate base, 2) the use of "future test year principles as a means of reducing regulatory lag" (he noted that the FPC had already done this and thus would allow utilities to actually earn a higher rate of return), 3) following the FPC's switch from the statutory five month suspension period to suspensions of lesser period "including one day suspensions", 4) following the FPC which "permits utilities to compute the tax allowance for cost of service purposes on a normalization basis . . . [which] improves cash flow for utilities. . ." and 5) following the FPC in ". . . a wider use of fuel adjustment clauses."

Indiana v. FPC, 481 F.2d 490 (CADC 1973), certiorari denied 414 U.S. 1068 (1975). If there is no agreement upon such matters, the disputes are submitted to the FPC through the means of a rate increase filing by the supplying utility, and the FPC determines the lawful rate under Sections 205 and 206 of the Federal Power Act. The Commission has the right to examine rates to determine whether they are lawful in any event, of course, as part of its responsibility under the statute. But this responsibility is only brought into play, as a practical matter, by a rate filing by a supplier. Most state commissions have a similar procedure within which to work. Thus it is very easy for a utility to establish a wholesale rate level (at least subject to refund) which will remain in effect for a considerable period of time, simply by filing at the FPC. In this case such a filing was made at the FPC; no filing was made at the retail level for a considerable time thereafter.[17]

The problem of FPC delay is not insignificant. The decision in the underlying rate case here is not expected in the near future; indeed, the hearing is not yet over. Recently, the Commission entered an order finally directing refunds in a rate case that had been filed, and effective, more than five years before.[18] As the FPC stated, in its Order No. 487, amending the Regulations to allow the "future test year", 50 FPC at 127:

[17] Since the institution of the underlying proceeding, two retail rate filings and an additional wholesale rate filing have been made. A final order has been issued by the Arkansas Commission in the first retail rate case, and sustained by the state intermediate appellate court, substantially cutting the increase collected. An interim order disallowing certain proposed "costs of service" and cutting back substantially the rate increase asked for in the second retail rate case has been issued, and the remaining increase is still being tried. By contrast, the hearing is not complete in the underlying case here, and a superseding wholesale rate increase became effective December 1, 1975.

[18] *Municipal Light Boards of Reading and Wakefield, Massachusetts v. Boston Edison Co.*, FPC Docket No. E-7400, *et al.*, Opinion No. 729 (May 13, 1975), rehearing denied, Opinion 729A (August 4, 1975) consolidated appeals pending *sub nom Towns of Norwood, Concord and Wellesley v. FPC*, CADC Nos. 75-1821, *et al.*

> "Moreover, under the Federal Power Act and current filing regulations thereunder, electric utilities are permitted to file virtually any level of costs and rates and after a period of suspension charge these rates subject to refund, pending Commission decision."

Thus, in effect, the FPC has encouraged those electric utilities with wholesale customers to file inflated "costs of service" based upon any projected costs they desire, and any experimental methodology they can find a witness to sponsor, with some assurance that no refunds will have to be made for a significant period of time ("nigh interminable", as this Court observed in *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 389 (1959)).[19] Customers, in view of the price squeeze alleged, view this procedure with what may be understandable apprehension.

In addition to these substantive matters, there is a further matter of the length of suspension imposed. As Chairman Nassikas pointed out in his Remarks to the Meeting of State Regulatory Commissioners and Federal Officials, *op. cit.*, the FPC has tended to move toward a very limited, and frequently one day, suspension, rather than the five month suspension envisioned by the Federal Power Act. Since state commissions frequently suspend for much longer periods, and sometimes cannot allow higher rates until after decision, this in itself tends to encourage filings at the FPC, and the difference creates a price squeeze, which the FPC apparently views as irrelevant to its decision on the length of the suspension period.

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[19] We note, as well, that others perceive the problem of delay. In the *Report of the Committee on Appropriations*, S. Rep. 94-505, 94th Cong., 1st Sess., Dec. 4, 1975, the Committee on Appropriations noted, at p. 104:

> "The Committee is concerned over the continued lengthy delays involving many areas of the regulatory process, including what appears to be an inordinate amount of time required to litigate wholesale rate cases. The Committee does not believe the situation can be blamed on the lack of adequate staff. The Federal Power Commission should take immediate steps to reallocate personnel among the diverse activities if necessary to reduce the backlog and delay time. Timely decisions in the regulatory process would enhance and protect the overall public interest."

All of the above are areas where, in issues that could affect both federal and state agencies, the FPC has apparently attempted to take the lead in obtaining higher rates for utilities to the detriment of the wholesale customers.

In sum, a public utility can easily discriminate against the wholesale customer with which it competes at retail and which it seeks to drive from the business to its own advantage by choosing the timing and form of filing to take advantage of the FPC's apparent willingness to create by its policy "costs of service" that no state commission would allow.

II.
DISCRIMINATION

A. The Law

One of the basic principles that has remained inviolate throughout the law, from historic common law to the present, is that when one holds a franchise, from the crown or the state, or otherwise has established a substantial monopoly control of a resource necessary for the functioning of a substantial part of society, he is bound to make that resource or the services associated with that resource available to all without discrimination, except as cost differences may justify. As Chief Justice Waite pointed out, in *Munn v. People of Illinois*, 4 Otto 113 (1877), in the course of an extensive review of the law providing for regulation of such monopolies,

> ". . . it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum charge to make for services rendered, accommodations furnished, and articles sold." *Id.* at 125.

Indeed, as the Court there noted (at 134):

> ". . . in matters which do affect public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the

charge to be reasonable, is itself a regulation as to price. Without it, the owner could make his rates at will, and compel the public to yield to his terms, or forgo the use."

As Mr. Justice Brewer stated for this Court in *Western Union Telegraph Company v. Call Publishing Company*, 181 U.S. 92 (1901), in upholding a decision awarding damages to one discriminated against, to the subsequent damage of its business, by the Western Union Company (at 99-100):

> "No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they may render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. but that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling."

The rationale for the common law prohibition against discrimination in these matters is clear. For to the extent that a necessary service is provided by one holding a monopoly or market dominance position, the use of that position to extract a non cost-justified differential in rates between users who, directly or indirectly, are competing with each other, directly undermines the ordinary risks and rewards associated with a market economy, in effect discouraging, to that extent, a more efficient enterprise from competing against a favored less efficient enterprise. To this degree, it is clear, discrimination by a utility or other "common carrier" deriving powers of eminent domain and market dominance from the state has always been unlawful. See, *e.g.*, *Alabama and Vicksburg Railway*

Company v. Mississippi Railroad Commission, 203 U.S. 496 (1906); *North Carolina Public Service Co. v. Southern Power Co.*, 282 Fed. 837 (CA 4, 1922) *appeal dismissed* 263 U.S. 508 (1924); *Postal Cable Telegraph Co. v. Cumberland Telephone & Telegraph Co.*, 177 Fed. 726 (M.D. Tenn., 1910).

As stated in *Salisbury & Spencer Ry. Co. v. Southern Power Co.*, 180 N.C. 422, 105 S.E. 28, 28-29 (S.Ct. N.C., 1920), a public service company enjoying the right of eminent domain may be compelled, by *mandamus*, to furnish electric current to the plaintiffs at the same rate, without discrimination, that the defendant furnishes it to other customers similar situated. In response to a contention that only a State Corporation Commission could alter the level of rates set by contract by the defendant company, the Court noted:

> "No public service corporation engaged in public employment can successfully sustain such a position. The court possesses ample power to prevent discrimination in rates by all public service companies, and it cannot be doubted that mandamus will lie to compel the defendant to furnish service to the consuming public without discrimination. This power is inherent in the courts and exists independent of the Corporation Commission, or even statutory law. It is derived from common law."

The court went on to quote this Court's decision in *Missouri P.R. Co. v. Larabee Flour Mills Co.*, 211 U.S. 612, 619 (1909):

> "Whenever one engages in that business, the obligation of equal service to all arises; and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts."

Thus the court concluded on this issue (at 29-30):

> "The fact that the Corporation Commission has the power and authority to fix the rates at which the defendant shall sell its current and energy to all consumers connecting with its lines in no wise precludes the courts from preventing the defendant from making unlawful discriminations in rates charged for the same, or substantially similar service. The Corporation Commission itself has no power to authorize such a discrimination, and if it appears to the court that an unlawful discrimination exists, it can be corrected by mandamus without regard to whether it results from a contract imposed by the defendant directly or otherwise."

Thus, that court held (at 31):

"It will not be difficult for the court, upon the hearing, to determine the lowest rate charged by the defendant for current and power furnished cotton mills, factories, municipalities, or other public service companies, under the same or substantially similar conditions. The lowest rate thus established will automatically become the proper rate to be charged the plaintiffs for such service. Otherwise, the defendant will still be unlawfully discriminating against the plaintiffs."

The court went on to note that, *ibid.*:

"By the application of this doctrine the court does not fix defendant's rates, but simply adopts the lowest rates which the defendant power company itself has fixed for the same, or substantially similar service. . . . This does not interfere with defendant's applying to the Corporation Commission at any time to fix the rates it shall be permitted to charge these plaintiffs and other customers of current receiving such service, but neither the Commission nor the defendant can fix rates that unjustly favor one consumer over another. The courts are always open to prevent this kind of discrimination, and, manifestly, the only way to prevent discrimination is to require the defendant to furnish current to these plaintiffs at exactly the same price it has fixed by contract to other consumers under substantially the same circumstances."

We note, as well, the recognition by Mr. Justice Shiras for this Court in *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U.S. 197 (1896), at 211, in discussing the problems of control of railroads prior to the enactment of the Interstate Commerce Act, that "relief to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers —particularly that one which requires uniformity of treatment in like conditions of service."

For, as this Court noted in *Union Pacific Ry. Co. v. Goodridge*, 149 U.S. 680, 690-691 (1893):

". . . it is no proper business of a common carrier to foster particular enterprises or to build up new industries, but deriving its franchise from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality."

The rationale for the obligation upon public service companies to serve without discrimination is well stated in

Western Union Telegraph Co. v. Call Publishing Co., supra, and has long been applied, at common law, to other "businesses affected with a public interest". As the North Carolina Supreme Court noted in *Salisbury & Spencer Ry. Co. v. Southern Power Co.*, 179 N.C. 19, 101 S.E. 593 (S. Ct. N.C., 1919) at 599, "It is of the highest importance that the claims of the defendant Southern Power Company to discriminate in the rates charged by it to purchasers under like conditions shall be clearly denied by the courts." In response to a contention that defendant had no duty to sell to competing distribution systems, the court responded, *ibid.*, that when defendant had chosen so to do;

". . . it dedicated its property to this particular class of public use, and cannot discriminate in charge or service between the several members of this class, for this would be a license to discriminate among cotton mills as a class, furniture factories, etc."

• • •

It is well settled that the common-law obligation of equal and undiscriminating service clearly requires that the same charges shall be made to all consumers for the rendering of similar service."

The Court went on, *ibid.*, to quote substantially from the succinct statement of grounds of decision by this Court in *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U.S. 92, at 99-100 (See p. 18, *supra*), and, citing *Postal Cable Telegraph Co. v. Cumberland Telephone & Telegraph Co.*, 177 Fed. 736, (M. D. Tenn., 1910), concluded that, *ibid.*,

"This obligation cannot be evaded, even though the purchaser of the current may be to some extent a competitor."

As the court went on to note (at 603), since defendant had access to low-cost power not, as a practical matter, available to the plaintiffs:

"the power the defendant claims of unrestricted rates and of absolute right to discriminate between purchasers would make it a despotism beyond a parallel in history."

In most of the cases discussed *supra*, the primary concern was the avoidance of discrimination between competing purchasers of goods or services rather than the aggrandizement of the discriminator furnishing those goods or services.[20]

[20] But see *Salisbury & Spencer Ry. Co. v. Southern Power Co.*, 179 N.C. 19, 101 SE 593 (S.Ct. N.C., 1919).

This concept goes far beyond the area of utilities and common carriers; to the extent that there is economic rationale for the Robinson Patman Act, 15 U.S.C. 13a, it is the same rationale —that growth of economic units should not be unfairly impeded or advanced by non cost-justified discrimination with respect to essential services.

The principle of refusing to allow a holder of a market dominance position unfairly to use that power to his own advantage is evident in other areas in the "tying" cases under the Sherman Act, *e.g., United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *International Salt Company v. United States*, 332 U.S. 392 (1947). Thus it is clear that the holder of a monopoly or market dominance position in one area may not use that dominance to gain a competitive advantage or foreclose competition in other areas. *United States v. Griffith*, 334 U.S. 100, 107 (1948); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973).

It is clear as well, in a horizontal competition situation, that one or some of a group of competitors, having access to a non-patented instrument of market dominance or "bottleneck", cannot use that instrument to the economic detriment of their competitors without making it available on the same terms to all. *E.g., United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912); *Associated Press v. United States*, 326 U.S. 1 (1945); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

The situation here alleged, however, is that of a "price squeeze" which occurs in vertically integrated situations, where a holder of market dominance at one level (*e.g.*, the holder of the bottleneck transmission which precludes other competition) discriminates, for its own ultimate advantage and aggrandizement, against its wholesale customers and in favor of its own retail customers. This situation, as well, as the Commission concedes (Brief, p. 42), is clearly unlawful under the antitrust laws. *United States v. Aluminum Company of America*, 148 F.2d 416 (CA 2, 1945); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 368-369, 375 (1927).

Thus, the situation here alleged, as shown by the discus-

sion above, may be seen to fall within that great body of the law precluding discrimination by one with market dominance, and utility power, to its own benefit and the detriment of its competitors. Indeed, because of the control both of the retail and wholesale rates (at least to the extent of filing) the situation here is perhaps among the most serious of those with which the body of law above discussed is intended to deal.

B. Remedy

Traditionally, of course, both at the FPC and at common law, when discrimination, either in service or rates, was charged, the remedy was quick and simple: unless a cost differential to serve was alleged and proved by the utility discriminating against the complainant, that utility would be ordered to lower its rates to the complainant to that charged to the favored customer.[21] The leading FPC case on this issue, *Otter Tail Power Co.*, 2 FPC 134 (1940) is directly in point and the decision speaks directly to the inference sought to be raised by the Commission before this Court (Brief, at page 32) that its only duty is to ascertain the wholesale rate which recovers the cost of wholesale service plus a reasonable return. As the Commission there noted, in opening its discussion on the law, that case, as this, involved "what is frequently termed a 'discrimination case' as distinguished from a 'rate case' " (at 135). The Commission found that Otter Tail Power Company had voluntarily made a series of different wholesale rates to different customers under substantially similar conditions (at 141). The Commission discussed the rate differentials apparent on the record, and held (at 142):

> This is clearly illustrative of the genesis of the vice of discrimination which regulatory commissions are almost uniformly directed to remove by the statutes under which they operate. As a matter of fact, the evil of discrimination was one of the prime motivating factors of the earliest regulatory statutes. The economic consequences of discrimination were well noted in *Griffin v. Maine Central Railway Company*, PUR 1916-A, 27, 28, where it is stated:

[21] See *Western Union Telegraph Co. v. Call Publishing Co.*, *supra*, and other cases cited, *supra*.

'Unquestionably of the two evils discrimination in rates is more offensive than excessive rates because within reasonable limits shippers can adjust themselves to higher rates, but not to unequal rates.'

We need not go into the long history of abuses, discriminations, preference, rebates, etc., which were the primary cause of the inhibition against this form of practice in the railroad regulatory statutes. [Footnote omitted] The inhibitions originally written into these statutes were substantially carried over into practically all of the utility regulatory statutes.

There is one other phase of discrimination which we should mention. Given a monopolistic position and the right to discriminate, an electric utility company is in possession of a strong unfair weapon in its dealings with municipalities. The facts of this case point clearly to the manner in which this may come into play."

The Commission then went on to discuss Otter Tail's rationale for the differential in rates to the first of several villages and towns. The Commission noted that (at 143) "it appears in large part that the reason the rates were maintained at such a high level was to force the village out of ownership of its distribution system and to require it to dispose of its faiclities to the respondent. . . ." The Commission went on to note that that policy had in fact been successful, and the Village of Marvin had been forced to dispose of its distribution system to Otter Tail (at 144).

The Commission went on to deal with the contention of Otter Tail (at 145) that the Commission could not require service to all customers similarly situated, at the lowest rate (the Fergus Falls rate) set by Otter Tail, since, Otter Tail contended, "the record shows affirmatively that the rates would not only be unjust and unreasonable but confiscatory." As the Commission noted, however, "this contention would appear to require this Commission, before being able to remove a patent discrimination, such as here exists, to conduct a complete 'rate case'. To accept such a construction of the applicable provisions of the Federal Power Act would be to render it ineffective for the reasonable accomplishment of its intended purposes." *Ibid.* The Commission went on to note, and accept, *arguendo*, the contention by Otter Tail "that it is now selling energy to Fergus Falls at less than cost". *Ibid.* The

Commission initially noted (at 146) that Otter Tail

". . . itself, fixed the Fergus Falls rate and there is nothing before us to show that the respondent voluntarily undertook to serve Fergus Falls under such conditions as would result in confiscation of the respondent's property. In this connection we are reminded, as Mr. Justice Cardozo pointed out in *Dayton Power & Light Company v. Public Utilities Commission*, 292 U.S. 290, 312, that:

'It is a strain on credulity to argue that the appellant, when putting into effect a new schedule of charges, was satisfied with one productive of so meager a return *** The argument proves too much; *** Men do not transact business without protest at confiscatory rates, at all events in the absence of extraordinary circumstances making submission to the loss expedient ***' ".

The Commission discussed at some length the principles of utility regulation and common law, and the court decisions thereon, particularly the cases of *Salisbury and Spencer Railway Company v. Southern Power Company*, 101 S. E. 593 (S. Ct. N.C., 1919), 102 S.E. 625 (1920), 105 S.E. 28 (1920); *North Carolina Public Service Company v. Southern Power Company*, 282 Fed. 837 (CA4, 1922); *Western Union Telegraph Company v. Call Publishing Company*, 181 U.S. 92, 100 (1901); *Alexander Sprunt & Son v. United States*, 23 F.2d 874, 878 (S.D. Tex., 1927)[22] Each of these cases, as the Commission viewed them, held that the adoption of a rule to remove discrimination was not tantamount to an order fixing the just and reasonable rate, but so long as the supplier voluntarily maintained a lower rate to a customer in the same class, all other customers were entitled to that rate (at 148). The Commission held (at 149):

"A common sense construction of Sections 205 and 206 of the Federal Power Act impels us to accept the principles announced in the foregoing cases as being equally applicable in solving the problems with which we are confronted in this case.

It occurs to us that one rate in its relation to another rate may be discriminatory, although each rate per se, if considered independently, might fall within the zone of reasonableness. There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned. The

[22] See also same case at 281 U.S. 249 (1930).

relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed.

For the purpose of removing a discrimination we interpret the statute to mean that the reasonable wholesale rate for any class of customers be no higher than the lowest rate charged by vendor utility to any customer for the same class of service under the same or substantially similar conditions. If a complete 'rate case' is to be conducted before the patent discrimination existing in the instant case is to be removed, such would obviously place a strained construction on the Act and render it ineffective for the expeditious removal of unjust discriminations."

This interpretation of the Act, at the inception, see also, *Gulf States Utilities Co.*, 1 FPC 522 (1938), by the agency charged with jurisdiction thereunder, and uniformly followed since,[23] would be entitled to judicial acceptance, even in the absence of the uniform line of cases, *supra*, to the same effect. *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945); *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153-154 (1946); *Power Reactor Development Co. v. Electricians*, 367 U.S. 396, 408 (1961); *Udall v. Tallman*, 380 U.S. 1, rehearing denied 380 U.S. 989 (1955). Thus it is clear that, in a discrimination case, into which class the instant price squeeze case falls, the remedy is simple and uniform: no cost of service "rate case" need be decided in order to afford expeditious relief against the discrimination. To the extent that a cost of service rate case demonstrates that a further lowering of the wholesale rates is necessary, that can abide the result of the lengthy rate case.

III.
THE COMMISSION IS EMPOWERED, AND DIRECTED, TO DEAL WITH THE SORT OF PRICE SQUEEZE HERE ALLEGED

We have demonstrated the sorts of discrimination and price squeeze that can and do occur in this industry, and the underlying common law and statutory law which would, but

[23] *E.g., Wisconsin Michigan Power Co.*, 31 FPC 1445, 1450-52 (1964).

for the Federal Power Act, plainly apply. thus it is clear, as the Commission does not contest, that if the allegations made by customers are true, the customers could resort to the courts under common law to recover single damages, or under the antitrust law to recover treble damages for the price squeeze or discrimination alleged.

The Commission contends that it need not even consider the discrimination and price squeeze here alleged because, it suggests, the framers of Part II of the Federal Power Act failed to give it authority to deal with discrimination when the lower of the rates involved in the discrimination is a retail rate.

Thus the issue is framed in its starkest terms: did the passage of Part II of the Federal Power Act remove the pre-existing remedies and protections allowed a customer against discrimination by an electric public utility intended to, and having the effect of, driving the customer out of business?

It may not be out of place for the customers to observe, prior to addressing the Commission's arguments on their merits, that the Commission seems to have lost sight here of the fact that the rate jurisdiction of the Federal Power Commission under the Federal Power Act and the Natural Gas Act was granted it to protect the *purchasers* of power in interstate commerce at wholesale and was framed so as to afford these customers a complete, permanent and effective bond of protection from excessive rate charges. *E.g., Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959).[24] It was the intention of Congress that power be sold in interstate commerce for resale at the "lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." *Ibid.*

A. The History of Part II Shows No Intent To Remove Any Kind of Protection That Would Previously Have Been Available.

Part II of the Federal Power Act was passed as Title II of the Public Utility Act of 1935, Title I of which was the Public Utility Holding Company Act of 1935. 49 Stat. 803. The

[24] Also see, *e.g., California Electric Power Co.*, 10 FPC 152, 162 (1951).

history of these two titles was inextricably intertwined, but it is very clear that the sort of competition for new or increased load underlying this proceeding was very much in the mind of the Congress. For example, the Public Utility Act of 1935 was passed consequent to the receipt by Congress of, and with regular reference to, the multi-volume study of the utility industry which had been completed on reference from the Congress by the Federal Trade Commission. S.Doc. 92, 70th Cong., 1st Sess. Cf 15 USC 79a(b). At Part 73-A, pp. 51-53, the Federal Trade Commission recognized, in the clearest of terms, the competiton that existed between adjoining utilities for new load, and the pressures that would be brought upon the higher cost supplier. That Commission concluded in general that, because of the existing judicial interpretation of the Sherman Act and the weakness of the then existing Clayton Act, these Acts were insufficient to deal with the problems caused in large part by the holding companies which eliminated competition among the operating utilities which they controlled, notwithstanding the existence in the industry of substantial and important intra-modal competition which ought to be preserved. Id, at 47-56.

The history of the passage of both Titles of the Public Utility Act of 1935 shows, as both this Court and other courts have noted, that ". . . the theme of elimination of 'restraint of free and independent competition' . . . runs throughout the Act." *SEC v. New England Electric System*, 384 US 176, 183 (1966); *Municipal Electric Ass'n of Massachusetts v. SEC*, 413 F.2d 1052, 1057 (CADC, 1969). See also, e.g., *City of Pittsburgh v. FPC*, 237 F.2d 741 (CADC, 1956); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953 (CADC, 1968). This need for the protection of competition is obviously even greater, of course, where, as here, there is a dual customer-competitor relationship.

The Commission has recognized this problem in earlier years. For example, in Hearing Before The Committee on Commerce, United States Senate, 89th Congress, 1st Sess., on S. 218 (Serial No. 89-38, 1965) at page 68, the then Chairman of the Federal Power Commission testified:

> "To the large privately-owned electric utility a retail customer, even a large industry, is simply a customer. However, a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a

> competitor in the fringe area where the two systems are contiguous, but may also be a direct or potential competitor for the commercial and industrial businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.
>
> The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipal systems succumb to purchase offers by investor-owned wholesale suppliers. In this respect wholesale rate regulation in the electric power industry is unique and faces far greater resistance by the privately-owned utilities than retail ratemaking. . . . The Nation values its pluralistic power economy and the role therein of the independent small-systems, public, cooperative, and investor owned. The necessity for Federal regulation to assure the survival of these small and medium-sized power systems is unmistakable."

The passage of Part II of the Federal Power Act thus was not intended to override the protection which would otherwise be afforded by the antitrust laws. As this Court held in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973):

> "There is nothing in the legislative history which reveals the purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.

Thus, it is clear that the illegality of a price squeeze of this nature continues to exist.

B. Part II of the Act Vests the Commission with the Authority to Deal With This Sort of Discriminatory Pricing.

Were it not for the hesitancy it now expresses, it would seem clear that the Commission has the responsibility to deal with the issue of price squeeze under its rate regulations pursuant to Sections 205 and 206 of the Act. As this Court noted, in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758-759 (1973):

> The Act had two primary and related purposes: to curb abusive practices of public utility companies by bringing them

under effective control, and to provide effective federal regulation of the expanding business of selling and transmitting electric power in interstate commerce. . . .

The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of anti-trust enforcement to restrain the growth and practices of public utility holding companies. . . .

In order to achieve Federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit. II was enacted. . . .

Title II certainly did not preclude the operation of the antitrust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy 72 Col. L. Rev. 64 (1972). *This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant* to . . . like *directives contained in §§205, 206* . . . The Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry." [Emphasis added]

Moreover, the decision of this Court in *Gulf States, supra*, is entirely consistent with the representation in this regard made to this Court by the Commission in its brief in that docket (brief for the Federal Power Commission in support of petitioner, Supreme Court Docket No. 71-1178). For example, at page 7 of that brief, the Commission represented that "in exercising its control over—rates, practices, and services of public utilities, the Commission has full authority to consider antitrust allegations and to prevent or remedy antitrust violations related to such matters." Further, the Commission, at page 13 of its brief, stated:

> ". . . allegations of anticompetitive conduct would be properly raised and fully considered by the Commission in proceedings . . . to review rates under Sections 205 and 206, . . . to review charges of unduly discriminatory rates or practices under Section 205. . . . Under each of these Sections the Commission has jurisdiction to compel certain action by a public utility. If anticompetitive conduct or effects were established in such proceedings and were not outweighed by other factors which determine public interest, the Commission

> could order a remedy directly related to the facts proven, *e.g.*—order a change in rates, etc."

And, at page 15, the Commission represented that "antitrust allegations can be relevant in proceedings . . . to approve . . . rates or practices of public utilities, . . . because monopolistic or discriminatory practices can be directly prevented or remedied in all these matters." See also, Commission brief at pages 12, 13, and 19. Thus, not only do the antitrust laws apply, outlawing the sort of price squeeze here alleged, but the Commission has correctly represented to the Court that it is required to enforce those laws in the course of its responsibilities under these very Sections of the Power Act.

Nor should there be any serious question about the Commission's power to regulate wholesale rates by decreasing them to allow the wholesale customers fairly to compete with their suppliers for retail business. Section 205(b) of the Act reads:

> "No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

This language would appear clearly to grant the Commission power to lower the wholesale rate subject to its jurisdiction in order to eliminate the unreasonable difference between classes of service here alleged. Section 205(b) does *not* say, as the Commission would apparently have it, that "no public utility shall, *but only when both sales are subject to the jurisdiction* of the Commission, (1) make or grant any undue preference or advantage. . . ." Rather, when the sale complained of is subject to the jurisdiction of the Commission, the Act requires the elimination of any undue preference to any person. It should be noted in this regard, that Section 206(b) expressly provides for the Commission to determine costs of certain non-jurisdictional sales, and this authority obviously ties back to the Commission's authority under Section 206(a) to eliminate discrimination. Moreover, Section 209, 16 U.S.C. 824h, expressly provides for methods of acting jointly with state commissions should joint action be necessary.

The Commission, however, at considerable length, recounts those portions of the extensive legislative history of the Public Utility Act of 1935 most favorable to its current views to support its contention that Congress withdrew the power to eliminate discrimination against the class of wholesale customers which it was established to protect. (Brief pp. 12-23). The difficulty with that argument is that, if carefully examined, it merely demonstrates the correctness of the decision below. In order to understand the legislative history here relevant, however, it is necessary to examine a portion of the history of railroad regulation by the ICC prior to 1935.

Although the Transportation Act of 1920 expressly gave the Interstate Commerce Commission the authority to remove undue or unreasonable preferences as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, the cases decided under Section 3 of the Act to Regulate Commerce[25] are directly relevant to the history here. For example in the *Shreveport* case, *Houston, East & West Texas RR Co. v. United States*, 234 U.S. 342, 356-357 (1914), this Court, in dealing with an order of the ICC directing a carrier to cease discrimination against interstate commerce caused by a very low intrastate rate within Texas while a higher rate was charged for interstate carriage to Texas from Louisiana under the same conditions, stated, in regard to a very similar nondiscrimination provision:

> "There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by relation of intrastate to interstate rates as maintained by the carrier. . . .
>
> Congress thus defined the scope of its regulation, and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrasate rates, and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states."

[25] Section 3, 24 Stat. at L. 379, 380.

However, where there was a discrimination created by the relationship between intra and interstate rates, the Court held, the ICC was authorized to order elimination of the discrimination by modification of the intrastate rate, if necessary.

As this Court stated in *American Express Co. v. State of South Dakota*, 244 U.S. 617 (1917), at 625,

> "Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the discrimination. But where, as here, there is a conflict between the Federal and the state authorities, the Commission's Order cannot serve as a justification for disregarding a regulation or order issued under state authority, unless, and except so far as, it is definite as to the territorial points to which it applies. For the power of the commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic."

Thus, it appeared clear that under *Shreveport* and its progeny, the ICC was entitled, in order to eliminate discrimination, to regulate and modify intrastate rates for transportation otherwise exclusively within the jurisdiction of various state Commissions. It was this concern—that the Federal Power Commission might, under *Shreveport* like powers, control intrastate rates otherwise set by the state regulatory commissions—that engendered the debate of which a portion is set forth in the Commission's brief here. For example, H. Lester Hooker, Chairman of the Legislative Committee of the National Association of Railroad and Utilities Commissioners, *Hearings before the Committee on Interstate and Foreign Commerce*, House of Representatives, 74th Congress, First Session, on H.R. 5423, Part III, at p. 1619, complained that under the proposed bill,

> ". . . the Federal agency will have authority to come into the States and where the intrastate rates are lower than interstate rates, increase the intrastate rates to the level of interstate rates, as the Interstate Commerce Commission does today with our railroad rates."

See also Statement of John E. Benton, General Solicitor of the National Association of Railroad and Utilities Commissioners, *Id.*, at 1620, *et. seq.* Mr. Benton went on to discuss, at 1623-1625, 1630-1638, how the states had lost jurisdiction to the ICC in setting railroad rates under the effects of the *Shreveport* doctrine. Thus, he stated, *id.*, at 1629:

> "We ask that with respect to electric companies the Federal Government provide regulation for wholesale interstate rates, which are beyond the reach of the State commissions, complete and adequate regulation; . . . we ask that the Federal Government withhold its hand from regulating that part of the business of these companies which is local, which has been held by the Supreme Court to be now under the jurisdiction of the State commissions."

It was, of course, these problems to which the amendments to the original bill referred to by the Commission were addressed. Thus, Senate Report 621, 74th Cong., First Sess., at p. 18 noted that:

> "Part 2 places the utilities under the regulated conditions which have been prescribed for the principal other national utilities."

In discussing the material differences between the bill reported and the bill as originally introduced, the Committee on Interstate Commerce noted that, *ibid.*:

> "The revision has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters."

The House Committee as well, in its report, H.R. Report 1318, 74th Congress, First Session, at pp. 7-8, noted the necessity for federal control of interstate transmission and sale of electric power because of the decision of this Court in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that:

> ". . . the rates charged in interstate wholesale transactions may not be regulated by the States."

Thus, the House Committee noted (*ibid.*):

> "Part II gives the Federal Power Commission jurisdiction to regulate these rates. A 'wholesale' transaction is defined to mean the sale of electric energy for resale and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce."

The Commission quotes (Brief, pp. 15-16) an exchange between Representative Pettengill and Solicitor DeVane before amendment of the bill, to the effect that the interstate rate would need only to be determined upon its reasonableness. It must be recognized, however, that Mr. DeVane was discussing a bill which would have automatically required all electric utilities to transmit wholesale power from any source to any customer desiring it, and thus under that bill, there would have been ample competition with regard to wholesale rates, so that no price squeeze could be effective.

It will, moveover, be noted that the colloquy between Representative Cole and Chairman Seavey of the FPC quoted by the Commission (Brief, pp. 17-18), simply supports the decision of the Court below, and indeed a point agreed to by all parties—that the FPC has no authority to *modify the retail rates* charged by AP&L. This does not, of course, in any way conflict with the holding below that the FPC has ample authority to deal with price squeeze by directing its action, in accord with historic common law precedent, to lower the higher interstate rate over which it has unquestioned jurisdiction.

Thus, it can be readily seen that Congress, in the passage of Part II of the Federal Power Act had no intention of reopening, or as the Commission would have it, expanding, the "Attleboro gap".[26] For, as this Court made clear in *FPC v. Southern California Edison Co.*, 376 U.S. 205, 216 (1964), Congress acted on the passage of Part II of the Federal Power Act by making "FPC jurisdiction *plenary* and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." [emphasis supplied]. As this Court noted in *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 458 rehearing denied

[26] Created by *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

405 U.S. 498 (1972), Part II was intended completely to close the "Attleboro gap" and to put all functions of public utilities under either state or federal regulation.

The Commission urges that it has somehow, by non-user, lost its power to prevent discrimination.[27] This is precisely the sort of "attractive gap" in regulation that this Court, in *FPC v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 20-22 (1961); and *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369-370 (1965) has determined Congress did not intend to leave in the passage of Part II of the Act. As the Court below correctly noted (at 1272):

> "A legislative intention to achieve such a regulatory gap is not to be presumed unless expressly presented. United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 . . . (1965); Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682-83 . . . (1954)."

[27] We note, however, that the Commission's citation of cases to this effect fails to cite some of its cases that might be relevant. While it is true that in *Jaspan v. Philadelphia Electric Co.*, 1 FPC 561 (1938), the Commission indicated that it would not *raise* a wholesale rate otherwise found to be a just and reasonable rate in order to eliminate discrimination against a higher retail rate, thus remitting petitioner to the remedies available under Pennsylvania law to decrease the higher discriminatory retail rate, the necessary corollary of that decision would appear to support the decision below. Moreover, in *Pacific Gas & Electric Co.*, 13 FPC 200 (1954) reversed on other grounds, 350 U.S. 348 (1956), the Commission at 209 held that the lower wholesale electric rates (*which it considered to be nonjurisdictional intrastate rates*) available to certain cities did not amount to an undue preference vis-a-vis the higher rates charged to Sierra Pacific Power Company:

> ". . . as it does not appear from the record . . . that either Sierra or the ultimate consumers served by it will suffer any competitive disadvantage by reason thereof. . .".

Thus, it appears clear that the Commission has construed its authority in these matters to extend to a discrimination imposed against jurisdictional customers by rates which it construed to be non-jurisdictional. See also, *Home Gas Co.*, 13 FPC 241, 267 (1954), where the Commission found a proposed wholesale rate design to be discriminatory vis-a-vis the company's retail sales. See also, *Wisconsin Michigan Power Co.*, 31 FPC 1445 (1964) where the Commission, at 1451, relied upon a rate argued by one of the parties to be non-jurisdictional in order to find an unlawful discrimination, which it directed be ended.

In analogous situations, we note that the Commission, without recognizing inconsistency, has embarked upon a program, utilizing similar statutory authority, to remedy discrimination in pipeline gas allocations between direct retail customers, the regulation of sales to whom has heretofore been left to the states, and the jurisdictional wholesale customers. This Court, in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972) addressed the issues of the Commission's powers in terms directly applicable here; especially when it is noted that the Natural Gas Act and Federal Power Act grew out of the same judicial history and legislative history. *FPC v. Southern California Edison Co.*, 376 U.S. 205, 211 (1964). This Court noted, *LP&L* at 631, that the Natural Gas Act granted the FPC broad powers "to protect consumers against exploitation at the hands of natural gas companies . . ." and that "to that end, Congress 'meant to create a comprehensive and effective regulatory scheme' . . . of dual state and federal authority."

> "Although federal authority was not to be exclusive, FPC regulation was to be broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare. This Congressional blueprint has guided judicial interpretation of the broad language defining FPC jurisdiction, and 'when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. [citation omitted] That is to say, in a borderline case where Congressional authority is not explicit we must ask whether the state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs' ". [citation omitted].

After concluding that state authority could not practicably regulate to prevent inequity and hardship in such matters, this Court addressed the argument of LP&L that the Commission could not reach, or consider, the direct sales as a jurisdictional matter. After reviewing the history of the problems which had occurred as a result of the "Attleboro gap", this Court noted (at 639):

> ". . . Congress enacted a federal 'sales' jurisdiction in the Natural Gas Act, by which Congress granted *rate-setting* authority to the Commission over all interstate sales for resale.

. . . Congress withheld *rate-setting* jurisdiction over direct sales. That rate-setting was the only subject matter covered by 'sales' jurisdiction and the 'direct sales' exception is clear from the legislative history. . . ."

This Court concluded, at 640-641:

"Thus, Congress' grant of sales jurisdiction as to sales for resale and the prohibition as to direct sales were meant to apply exclusively to *rate-setting*, and in no wise limited the broad base of 'transportation' granted the FPC. That head of jurisdiction plainly embraces regulation of quantities of gas that pipelines may transport, for in that respect Congress created 'a comprehensive and effective regulatory scheme' [citation omitted] to 'afford consumers a complete, permanent and effective bond of protection. . .' . . . Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation."

Thus it seems clear that, under the rationale of *LP&L*, the only power withheld from the Commission was the power to set retail rates. This is in accord with the legislative history, *supra*, which makes clear that the only power sought to be withheld from the FPC in discrimination cases that the ICC had was the power to modify *retail* rates. Thus the Commission would have authority to deal with the price squeeze here by using the traditional remedy of lowering the higher, offending, jurisdictional rate. The head of discrimination authority would plainly so allow, regardless of whether the Commission were precluded from modifying the lower retail rates.[28]

If there were any question as to the Commission's ability so to act, it would have been resolved by this Court in its decision in *Panhandle Eastern Pipe Line Co. v. FPC*, 324 U.S. 635, 646-47 (1945), interpreting the analogous section of the Natural Gas Act, Section 5(a), 15 U.S.C. 717d(a):

"The Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration

[28] We note that in many of the cases cited in Section II of this Brief, *supra*, the courts or regulatory agencies could not modify the lower, contract rates against which discrimination was measured; nonetheless, there seemed little question that the higher, discriminatory rate could be lowered to eliminate the discrimination.

when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction. For Section 5(a), 15 U.S.C. 717d(a), provides that whenever the Commission 'shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential*, the Commission shall determine the just and reasonable rate.' [Italics added by the Court]. It is clear that contracts covering direct industrial sales come within that italicized clause of Section 5(a)."

The Commission views the *Panhandle* language as inapposite for reasons that are not wholly clear but appear to boil down to an assertion that because the issues there were somewhat different, the language is somehow not in point. Unfortunately for its position, however, at pp. 22-23 of its brief to this Court in that case, the Commission expressly told this Court that the discrimination clause in the Natural Gas Act applied to direct industrial sales vis-a-vis jurisdictional sales.

Moreover, the Commission has in the past expressly set jurisdictional rates under the Natural Gas Act to allow competition with non-jurisdictional gas and other fuel rates, recognizing that the jurisdictional rates may be set below what the Commission might otherwise considerable to be just and reasonable. See, e.g., *Florida Gas Transmission Co.*, 47 FPC 341, 366-368 (1972).[29] It is difficult, if not impossible, to see how these actions on the part of the Commission square with its present insistence that (JA53) "wholesale rates must recover allocated wholesale costs".[30]

[29] The Commission (Brief, p. 23, n. 19) distinguishes that decision because, it states, that rate "was not, as Conway implies, imposed by the Commission" We note that the Commission has apparently forgotten that, as it correctly characterized the circumstances of that case at the time, 47 FPC at 381, "Here we are *prescribing* a higher I rate, but any deficiency below fully distributed costs will still be absorbed by other jurisdictional services." [emphasis added].

[30] Obviously there are many instances in which the lawful rates may not "recover allocated wholesale costs." In addition to the discrimination cases, *supra*, and the competitive source pricing cases, *supra*, there are the cases where the rate is fixed by contract not subject to change. *E.g.*, *FPC v. Sierra Pacific Power Co.*, *supra*; *Richmond Power & Light of the City of Richmond, Indiana v. FPC*, *supra*.

It may be noted, as well, that this Court in *American Trucking Associations v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397 (1967), rehearing denied 389 U.S. 859, has recently concluded that the ICC's anti-discrimination authority clearly requires that, if railroads offer certain services to their customers, they must offer those services as well to their competition on a non-discriminatory basis even if the ICC could not require the inter-modal transportation thus resulting to be offered absent the discrimination.[31]

IV.
ANTIDISCRIMINATION PROVISIONS UNDER PART I OF THE ACT

As we have seen, there is little, if any, support for the Commission's strained reading of Sections 205 and 206. An additional complication which the Commission has sought to sidestep is the interaction of the antidiscrimination provisions of Part II of the Act with those of Part I of the Act.[32] For Section 20 of the Act, 16 USC 813, provides:

> "That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a Commission or other authority to enforce the requirements of this section within such State . . . jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefore as constitute interstate or foreign commerce. . ."

[31] Note also that this Court has held, in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), rehearing denied, 348 U.S. 932 (1955), that the prohibitions of the Robinson-Patman Act apply to price cutting in intrastate commerce even when no cuts or other actions are made in interstate commerce.

[32] Part I of the Act applies generally to licensees of hydroelectric projects, including AP&L.

Section 19, 16 USC 812, further provides that, as a condition of a hydroelectric license under Part I, if a state has not authorized and empowered a commission to regulate and control the services to be rendered by a licensee or the rates and charges of payments therefor, jurisdiction is conferred upon the Commission to exercise such regulation and control until such time as the State shall have provided a commission or other authority for each such specific matter of regulation and control. Obviously, it makes little or no sense to read Sections 205 and 206 to exclude FPC jurisdiction over the sort of price squeeze here alleged, since it seems clear under *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964) that no state can have jurisdiction to act against a price squeeze by lowering a wholesale customer's discriminatory rate.[33] If that is the case, then by virtue of Sections 19 and 20, the Federal Power Commission is automatically granted authority under Part I to eliminate the discrimination because of its refusal to do precisely that under Sections 205 and 206. We are aware of nothing in the legislative history or cases under the Act to require such a round about method of acquisition of jurisdiction by abnegation.

V.
THE ALTERNATIVES SUGGESTED BY THE COMMISSION

The Commission for the first time in its brief to this Court urges (at pp. 10, 41–42) that the customers have a remedy in federal court under the Sherman Act for a price squeeze. It may well be that there is jurisdiction under the Sherman Act to remedy a price squeeze, although the Commission's suggestion appears to rest impliedly upon its contention, repeated several times throughout its brief, that the fault

[33] The argument by the Commission (Brief, pp. 27-28) that a state commission *can* eliminate the discrimination, but only by raising the retail rates, is amusing, but hardly reasonable.

lies with a "voluntarily depressed retail rate" (Brief, p. 41, n. 34), whereas customers have never characterized the retail rates of AP&L, concentrating instead upon the price squeeze imposed because of the *increased* wholesale rates.

The difficulty with the Commission's argument is that it ignores the complications involved. For example, even if a utility files a wholesale rate which it has every expectation will be well in excess of anything the FPC will allow, after final decision, this Court's decision in *Montana-Dakota Utilities co. v. Northwestern Public Service Company*, 341 U.S. 246 (1951) appears to give the Commission primary jurisdiction over the determination of the propriety of that rate, at least on cost justification. The *Montana-Dakota* case is one of the bases for the so-called "filed rate doctrine" which has been regularly used to preclude or avoid collateral attack on rates. The Commission may be disclaiming such primary jurisdiction (p. 41, n. 34) but the customers have every expectation that this doctrine would be raised by AP&L, if customers sought relief before a federal court in Arkansas. Moreover, if the State Commission has adjudged the retail rates just and reasonable, and that decision is acquiesced in by the company, while it files a very high wholesale rate, the federal court would be required to give damages measured by the difference between the two rate schedules, thus indirectly requiring the company to lower its wholesale rates.

It certainly is arguable that the state and federal courts retain basic jurisdiction to restrain, by injunction or mandamus, a public utility from filing excessive wholesale rates, under the authorities set forth, *supra*, in Secton II. It may be, as well, that relief directed against the utility could be obtained, requiring the utility to modify its filing before the federal or state commissions *Cf. Pan American Petroleum Corp. v. Superior Ct.*, 366 U.S. 656 (1961). With all respect, however, it seems clear that resort to these remedies should, as a matter of comity and accommodation between the various branches of government and between state and federal authority, be a last resort rather than a remedy to be repaired to whenever a

filing instituting a "price squeeze" is made.[34] It would appear that the FPC, perhaps without realizing it, proposes a remedy that would insert the courts, not only into the existing lacunae, but also into a Laocoon.

CONCLUSION

We have shown that there is no merit to the elaborate legalisms which the Commission has constructed to avoid facing the issue of discrimination here.[35] As this Court and other courts have stated in analogous cases:

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the . . . Act so singlemindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an Administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Southern Steamship Co. v. NLRB, 316 U.S. 31, 47, (1941); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 34 (CADC 1950). It is time, and indeed long past time, for the Commission to recognize its responsibility to protect the customers of wholesale power for resale against the sort of price squeeze which has now become very common. It is these customers which the Commission was established to protect, and its abdication

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[34] We note, *inter alia*, that if a contention is made that a discrimination is "cost justified", the court might find itself embroiled in exactly the sort of lengthy, and difficult, determination of costs made by the FPC and by state regulatory agencies.

[35] In any event overrefined readings of Sections 205 and 206 by the Commission could not apply to Sections 20 and 19 which are plainly applicable to *all* rates.

in this area seriously endangers the pluralistic nature of the electric industry in this country.

For these reasons, and those stated above, the decision below should be affirmed.

Respectfully submitted,

Robert C. McDiarmid
Sandra J. Strebel

February 17, 1976

STATUTORY APPENDIX

FEDERAL POWER ACT, 16 USC 791 a *et seq.* Section 19, 16 USC 812:

§812. Public-service licensee; regulations by State or by commission as to service, rates, charges, etc.

As a condition of the license, every licensee under this chapter which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter. (June 10, 1920, ch. 285 § 19, 41 Stat. 1073.)

Section 20, 16 USC 813:

§813. Power entering into interstate commerce; regulation of rates, charges, and so forth.

When said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefore as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce approved February 4, 1887, as amended, and the parties

subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 807 of this title for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this chapter. (June 10, 1920, ch. 285, § 20, 41 Stat. 1073.)

Section 201, 16 U.S.C. 824:

SUBCHAPTER II.—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§824. Declaration of policy; application of subchapter; definitions

(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy

which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this subchapter and sub-chapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter.

(f) No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. (June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847.)

Section 205, 16 U.S.C. 824d:

§824d. Rates and charges; schedules; suspension of new rates.

(a) All rates and charges made, demanded, or received

by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (June 10, 1920, ch. 285, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851.)

Section 206, 16 USC 824e:

§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. (June 10, 1920, ch. 285, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852.)

Section 209, 16 USC 824h:

§824h. Joint boards; composition; references to boards by Commission; cooperation with State Commissions

(a) The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be

conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 10, 1920, c. 285, § 209, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 853.)

Supreme Court, U. S.
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No. 75-342

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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1. In the preliminary portions of its brief Conway Corporation, *et al.*[1] claims repeatedly that the Federal Power Commission ("Commission" or "FPC") seems intent on inflating wholesale rates (see Conway Br., pp. 14, 16, 17). While the Commission disputes these claims, a detailed refutation would be pointless because they are irrelevant to the issue in this case: Whether the Commission has statutory authority to reduce a public utility's otherwise just and reasonable

[1] Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative, Inc., Arkansas (collectively referred to as "Conway").

wholesale rates because a utility allegedly maintains depressed, anticompetitive retail rates (Pet. App. 22a–23a).

2. Failure now to acknowledge that this is the central issue presented allows Conway to argue that the Commission erred in "persist[ing] * * * in here asserting" that "the fault lies with a 'voluntarily depressed retail rate'" (Conway Br., pp. 13, 41–42). Conway claims that the fault lies with "the higher, offending, jurisdictional [wholesale] rate" (Br., p. 38).[2]

But the alleged impact of voluntarily depressed retail rates is at the core of the present controversy, as the court of appeals recognized.[3] Thus the court characterized the matter as "the utility's own decision to *depress certain retail revenues* in order to curb the retail competition of its wholesale customers" (Pet. App. 22a–23a; emphasis supplied). Indeed, in its petition for rehearing before the Commission (J.A. 56; emphasis added) Conway characterized the wholesale rate as "substantially more than is charged retail customers with similar characteristics whose rates the company has *voluntarily refused even to seek to increase* * * *."

[2] Similarly, the American Public Power Association ("APPA") suggests that the issue of depressed retail rates is the *Commission's* "postulate" (Br., p. 5), "hypothetical" (Br., p. 21), "fanciful hypothesis" (Br., p. 21), or "odd assumption of masochism in setting low retail rates" (Br., p. 22). "APPA" refers to *amicus*, American Public Power Association and "Cities" refers to *amici*, Cities of Batavia, Geneva, Naperville, Rock Falls, St. Charles and Rochelle, Illinois.

[3] Cities, for their part, also recognize this as the underlying issue (see, *e.g.* Br., pp. 5–8, 28, 32).

As the court of appeals recognized, were the Commission to establish wholesale rates in these proceedings without reference to retail rates, it would establish a just and reasonable rate. If this rate is to be lowered, it is because the retail rate—subject to the jurisdiction of a state commission and not the FPC—has been purposely set at an artificially low and anticompetitive level.

However, this Court has recognized that, even where a federal agency does have the power to remedy a discrimination between jurisdictional wholesale rates and nonjurisdictional retail rates, it may not do so by sacrificing the federally mandated just and reasonable rate. In *Houston, East & West Texas Ry. Co.* v. *United States* (*Shreveport* Case), 234 U.S. 342, the Court considered a discriminatory disparity between just and reasonable, federally regulated interstate rates and voluntarily depressed[4] intrastate rates regulated by the state. The Court stated (234 U.S. at 355):

> It is * * * clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to [otherwise] be a proper standard * * *.

3. Both Conway and Cities make oblique criticisms of the Commission's discussion of the legislative history of Sections 205(b) and 206(a) of the Federal

[4] The depressed intrastate railroad rates in *Shreveport* although established by the Railroad Commission of Texas, were accepted and fully acquiesced in by the railroad "without more, at most than a perfunctory protest" (see 205 Fed. 380, 386, 391).

Power Act, 16 U.S.C. 824d(b) and 824e(a) (see *e.g.*, Conway Br., pp. 32–33, 35; Cities Br., pp. 4, 6, 9–11). However, neither Conway nor Cities offers as much as a single word of legislative history that is in any way contrary to that adduced by the Commission.

The Commission's opening brief (pp. 13–21) demonstrated that the Interstate Commerce Commission's (ICC) broad power to remove discriminations caused by nonjurisdictional rates under Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), as interpreted by this Court in the *Shreveport* case, *supra,* was specifically excluded from the scope of Sections 205(b) and 206(a) of the Federal Power Act. Nevertheless, Conway and Cities claim that the language of Sections 205(b) and 206(a) is "very similar" (Conway Br., p. 32), "indistinguishable" or "substantively identical" (Cities Br., pp. 9, 11) to Section 3(1) of the Interstate Commerce Act.

Cities claim (Br., pp. 10–11) that by focusing on the general jurisdictional provisions of the Federal Power Act and Interstate Commerce Act, 16 U.S.C. 824(b) and 49 U.S.C. 1(2)(a), respectively, one may compare the authority of the FPC and ICC to remedy discrimination. On the contrary, the proper focus is on the antidiscrimination provisions of the two acts. Sections 205(b) and 206(a) of the Federal Power Act differ markedly from Section 3(1) of the Interstate Commerce Act. As the Court explained in *Shreveport,* supra, 234 U.S. at 356–359, the latter provision gives the ICC broad authority with respect to discriminatory nonjurisdictional rates, authority which the ICC *would not otherwise possess* under its general jurisdictional statute, 49 U.S.C. 1(2)(a). In contrast, the FPC's authority to remedy discriminatory rates under Sections 205(b) and 206(a) of the Federal Power Act is expressly limited to rates for *"any transmission or sale subject to the jurisdiction of the Commission" ibid.*; emphasis supplied), that is, *"the sale of electric energy at wholesale"* (Section 201(b), 16 U.S.C. 824(b); emphasis supplied).

Finally Conway attempts to circumvent the unequivocal statement in the legislative record that the Commission is to evaluate a jurisdictional wholesale rate based "upon its reasonableness, *its reasonableness without regard to what the intrastate rate is*"[5] by suggesting (Br., p. 35) that the deletion of a provision giving the Commission authority to order transmission[6] somehow changed Congress' intent with respect to the limits of Commission authority under Sections 205(b) and 206(a). Conway's suggestion is a *non sequitur.*

4. The opposing parties also claim that the Commission's present interpretation of the meaning of Sections 205(b) and 206(a) of the Federal Power Act is inconsistent with Commission precedent. However, they have ignored the fact that the Commission's view was announced nearly forty years ago in *Jaspan* v. *Philadelphia Electric Co.,* 1 F.P.C. 561, 565:

> The Federal Power Commission * * * has no power or authority to remove unjust discrimi-

[5] Hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., p. 503 (March 12, 1935; emphasis supplied).

[6] See *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 375.

> nation which may be the result of rates charged * * * to * * * intrastate [retail] consumers.

Furthermore, the opposing parties' discussion of *Otter Tail Power Co.*, 2 F.P.C. 134, begs the underlying question,[7] because *Otter Tail* involved discrimination between *wholesale* customers.[8]

Conway (Br., pp. 38–39) and Cities (Br., pp. 25–27) also place great emphasis on *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635. The reasons why *Panhandle* does not advance respondent's case were explained in our opening brief (pp. 24–27). However, we note that Conway here claims (Br., p. 39) that the Commission, in its *Panhandle* brief "expressly told this Court that the discrimination clause in the Natural Gas Act applied to direct industrial sales." Conway has been too selective in its reading of that brief. What the Commission said was that, under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), it had *transportation* jurisdiction over direct industrial sales, and that the antidiscrimination provisions of Sections 4(b) and 5(a) of the Natural Gas Act, 15 U.S.C. 717c(b) and 717d(a), specifically apply to such

[7] See Conway Br., pp. 23–26, APPA Br., pp. 13–15, Cities Br., pp. 29–30.

[8] Nor is Cities' quote (at Br., p. 29) from *Otter Tail*, 2 F.P.C. at 146, relevant. This is because evidence of APLC's retail rates was not offered for the purpose of showing the intrinsic reasonableness of those rates (see the Commission's opening brief at p. 24, n. 22). Likewise, APPA errs (at Br., p. 20, n. 12) when it fails to recognize that evidence of APLC's retail rates, even if they could be relevant in assessing APLC's risk as an investment, the evidence was not offered for that purpose.

transportation.[9] The Commission's view of its jurisdiction in this case is entirely consistent with *Panhandle*.[10]

5. Conway's discussion (Br., pp. 40–41 and 43, n. 35) of the antidiscrimination provisions of Part I of the Federal Power Act, specifically Sections 19 and 20 thereof, 16 U.S.C. 812 and 813, is incorrect.

[9] In its *Panhandle* brief the Commission said (Br., p. 23):

"Petitioners' contentions that their interstate direct industrial business was to be entirely free of regulation is not persuasive (Br. 19–21). [Footnote omitted.] They overlook the fact that Section 1(b) makes the provisions of the Act applicable 'to the transportation of natural gas in interstate commerce,' and incorrectly state (Br. 19) that the section makes the provisions of the Act applicable only to the transportation and sale in interstate commerce of natural gas for resale."

[10] Contrary to what the opposing parties imply (Conway Br., p. 36, n. 27; Cities Br., p. 25, n. 32), in *Pacific Gas & Electric Company*, 13 F.P.C. 200, 209, the Commission did not establish jurisdictional rates on the basis of rates which it considered nonjurisdictional. Similarly, Conway misapprehends *Home Gas Company*, 13 F.P.C. 241, 267, where the Commission found that certain rates improperly allocated costs as between wholesale and retail customers and discriminated against the wholesale class.

Finally, Conway misreads both *Wisconsin-Michigan Power Company*, 31 F.P.C. 1445, 1451, and *Florida Gas Transmission Company*, 47 F.P.C. 341. In *Wisconsin-Michigan* the subject rate was clearly jurisdictional and a specious claim to the contrary was emphatically rejected. In *Florida Gas* the pipeline company *voluntarily* offered interruptible service at less than cost because an interruptible rate based on fully allocated costs would not have been competitive with alternative fuels. No firm customers objected because their fixed cost burden was reduced because of the interruptible sales. Nevertheless, finding that more fixed costs could be allocated to the interruptible rate while maintaining its competitiveness, it was that adjustment alone which the Commission was "prescribing" (Conway Br., p. 39, n. 29) in *Florida Gas*.

Under Part I, which was formerly the Federal Water Power Act of 1920, the Commission has authority to license the development of hydroelectric facilities, but it is not given any ratemaking authority. The one exception is where a licensee's retail rates, otherwise subject to state regulation, are not so regulated.[11] In this case, although APLC is a licensee under Part I of the Act,[12] its rates are subject to the full scope of state regulatory authority.

6. The opposing parties also argue, citing *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, that if the Commission does not remedy the discrimination alleged here, there will be a "gap" in regulation (see *e.g.*, Cities Br., pp. 28, 30–31).[13] The parties misapprehend *Gulf States*. In that case the Court said that "in *appropriate circumstances*" the Commission is to consider "the anticompetitive effects of *regulated aspects* of interstate utility operations," 411 U.S. at 758–759; emphasis supplied. However, here it is the retail rates, which are not regulated by the FPC, that cause the alleged discrimination.[14]

[11] See *Louisville Gas & Electric Co.* v. *FPC*, 129 F. 2d 126, 132 (C.C.A. 6), certiorari denied, 318 U.S. 761.

[12] APLC operates two small hydroelectric projects, licensed in 1923. They produce less than 2 percent of APLC's total system generation (1975 APLC Annual Report, FPC Form No. 1, p. 431).

[13] See also, Conway Br., pp. 5, 29–31; Cities Br., pp. 3, 4, 16–18, 22, 23–25; APPA Br., pp. 5, 11–12, 24–26.

[14] Ignoring the Commission's opening brief at p. 29, n. 26, Conway continues to assert (Br., pp. 5, 30–31), as does APPA (Br., pp. 11, 26), that in the Commission's *Gulf States* brief to this Court, it took the position that Section 205(b) gives the Commission authority to remedy the price squeeze. The Commission said nothing of the kind.

Moreover, the want of jurisdiction on the part of the Commission to remedy this discrimination does not create a "gap" in regulation. Aspects of a utility's relationship with its wholesale customers—if violative of the antitrust laws—which are not subject to agency regulation are subject to judicial sanction. See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366.[15]

Finally, there is no reason why recourse under the antitrust laws should "as a matter of comity * * * be a last resort rather than a remedy repaired to whenever a filing instituting a 'price squeeze' is made" (see Conway Br., pp. 42–43). Under the opinion of the court of appeals, the Commission would be empowered to reduce wholesale rates to "the lower range of the zone of reasonableness" (Pet. App. 22a). Such relief is narrow and ephemeral. As a consequence, the "constant and otherwise unnecessary" litigation of which Conway speaks (Br., p. 9) would nevertheless

[15] Nor do *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, or *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 support a different conclusion (see Conway Br., pp. 35–38, Cities Br., pp. 17–18, APPA Br., pp. 24–25). The conduct challenged in each of those cases, although inconsistent with certain aspects of the public interest, was otherwise lawful, and in the absence of FPC jurisdiction would not have been subject to government regulation of any kind. That is not the case here, where the alleged conduct is in violation of the antitrust laws and subject to full judicial scrutiny.

Moreover, the Commission's power to assure that curtailment of natural gas deliveries does not unduly discriminate between wholesale and retail customers arises from its jurisdiction to regulate all *transportation* of natural gas in interstate commerce whether the gas so transported is ultimately sold at wholesale or retail. *Louisiana Power & Light Co.*, *supra*, 406 U.S. at 636. *Ratemaking* jurisdiction under both the Natural Gas Act and the Federal Power Act is limited to sales for resale.

be necessary despite FPC jurisdiction over the discrimination alleged here.

Respectfully submitted.

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OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR ARKANSAS POWER & LIGHT COMPANY

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REPLY BRIEF FOR ARKANSAS POWER & LIGHT COMPANY

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INTRODUCTION

Arkansas Power & Light Company is submitting this Reply Brief in response to certain arguments advanced by the Respondents (Conway Corporation, *et al.*), the Cities of Batavia, Geneva, Naperville, Rock Falls, St. Charles and Rochelle, Illinois (River Cities), as *Amici Curiae*, and the American Public Power Association (APPA), also as *Amicus Curiae*.

ARGUMENT

I. COMMON LAW CONCEPTS OF UTILITY RATEMAKING DO NOT CONFER POWER UPON THE FPC TO REMEDY ALLEGED DISCRIMINATION BETWEEN WHOLESALE AND RETAIL RATES.

Conway has devoted the greater part of its argument (Conway Br., pp. 10-29) to developing the proposition that under the common law, a regulated utility has never been free to discriminate in pricing its product between two similarly situated customers. This proposition does not address the single issue in this case which is simply to determine what ratemaking powers were and were not vested in the Federal Power Commission by the Federal Power Act.

As a federal administrative agency, the Commission has no general or common law powers but only such power as was conferred by its organic statute. *See, e.g., Federal Trade Commission* v. *Sinclair Ref. Co.*, 261 U.S. 463, 475 (1923); *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316, 322 (1961). Since the Federal Power Act reserves to the states the authority to fix rates for retail sales of electricity and denies to the Commission any power to modify or review such rates, the Commission is devoid of the necessary power to adjudicate allegations of price discrimination between these retail rates and the interstate wholesale rates which are subject to its jurisdiction. Moreover, Conway's repeated citations to the *Salisbury & Spencer Ry. Co.* trilogy of cases[1] are not

[1] *Salisbury & Spencer Ry. Co.* v. *Southern Power Co.*, 179 N.C. 19, 101 S.E. 593 (1919); *Salisbury & Spencer Ry. Co.* v. *Southern Power Co.*, 179 N.C. 330, 102 S.E. 625 (1920); *Salisbury & Spencer Ry. Co.* v. *Southern Power Co.*, 180 N.C. 422, 105 S.E. 28 (1920).

relevant to the issue at bar, since those cases dealt only with the rate reviewing powers of a common law court sitting in North Carolina years prior to the enactment of the Federal Power Act.

As the *Otter Tail Power Co.* case, 2 F.P.C. 134 (1940), illustrates, within its own sphere of regulatory authority the Commission has recognized its statutory responsibility to eliminate non-cost justified price differentials between two or more customers subject to its jurisdiction. There, by reason of the power company's decision to charge one interstate wholesale customer less than was being charged to other interstate wholesale customers with similar load characteristics (delivery voltage, seasonal fluctuations, etc.), the Commission determined that an undue discrimination was established. For the purpose of removing that discrimination, it was assumed that the reasonable wholesale rate for all jurisdictional customers of the same class should be not higher than the lowest rate charged by the power company to any customer of that class (2 F.P.C. at 141, 149).[2]

[2] The American Public Power Association has completely misconstrued the facts and law of *Otter Tail Power Co.*, *supra*, (APPA Br., p. 13). In arguing that the Commission there reached alternative holdings, one of which supposedly supports the exercise of Commission jurisdiction over alleged cross-jurisdictional price squeezes, APPA states that the "case involved not just discriminatory rates among wholesale customers, but also discrimination between Otter Tail's own retail rates and its wholesale rates." To the contrary, the Commission specifically noted that:

> All respondent's customers here involved belong in the same general class—wholesale customers. Wide variations in the terms and rates charged these customers exist. (2 F.P.C. at 141)

Nothing in *Otter Tail Power Co.*, or in any other of the Commission's rate discrimination cases, suggests, however, that the Commission has the power to remove price differentials across the jurisdictional boundaries clearly established by the Federal Power Act. By the Act's own jurisdictional limitations, an interstate power company's retail customers are in a separate class from its interstate wholesale customers.[3]

II. CONWAY AND THE *AMICI CURIAE* HAVE FAILED TO DEMONSTRATE THAT THE FEDERAL POWER ACT GRANTS THE AUTHORITY TO REVIEW PRICE DIFFERENCES BETWEEN WHOLESALE AND RETAIL RATES.

Conway makes only a cursory analysis of the Federal Power Act's statutory construction, preferring instead to state the opinion that the language of §205(b) "would appear clearly" to grant to the Commission a jurisdictional scope which the Commission itself has never claimed (Conway Br., p. 31). Similarly, other than setting forth the language of §205(b) and quoting from

[3] This separation between wholesale classes and retail classes is not merely a legal one because, in addition to serving the function of dividing regulatory control between state commissions and the Federal Power Commission, it reflects the physical differences in providing the two services. For example, wholesale service is generally provided at different voltages and load factors than retail service. Such differences belie Conway's argument, as well as those of the *Amici Curiae*, that the Commission's position would result in price discimination between different customers receiving identical electric service—service to wholesale and retail customers is not identical.

the opinion of the court below (APPA Br., p. 7), APPA makes no analysis of the Act's actual language to support its assertion that "the statute is meaningless" unless interpreted as giving the Commission plenary jurisdiction to deal with allegations of cross-jurisdictional price squeezes.

Conway has, however, advanced an argument, unsupported by the *Amici Curiae* or the opinion of the court below, that if the Commission is correct in its analysis of §§205(b) and 206(a), the Commission would nevertheless be required under §§19 and 20 of the Act, 16 U.S.C. §§812 and 813, to accept jurisdiction in this case (Conway Br., pp. 40-41). Conway's elliptical references to these sections hardly constitute a rational jurisdictional foundation. As Conway's brief illustrates (Conway Br., p. 40), the nondiscriminatory rate schedule included in §20 relates solely to power generated by hydroelectric projects. Thus, if the Commission is deemed to have jurisdiction to prevent discrimination between wholesale and retail rates under these sections, it is dependent upon the existence of hydroelectric power in a particular company's system; *a fortiori*, the Commission would have no such jurisdiction over the large number of companies in the electric power industry which have no hydroelectric power projects. In this case, AP&L has only one small hydroelectric project, licensed in 1923, which produces less than 1.74% of AP&L's total system generation (1975 Annual Report of AP&L, F.P.C. Form No. 1, p. 431).[4] If this fact became the basis for Commission jurisdiction, the tail indeed would appear to wag the dog.

[4] This hydroelectric project produced only 1.47% of the power for AP&L's territorial sales in 1975.

Moreover, the Commission's authority to remedy a hydroelectric licensee's discriminatory rate policies exists only "whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State" (16 U.S.C. §813). Arkansas has such a commission[5], and today state commissions having similar jurisdiction exist in substantially all of the states of the Union.

Recognizing that the Commission does not have authority to remedy cross-jurisdictional price squeezes unless the Federal Power Act provides for it, River Cities, as *Amici Curiae*, have attempted to show that the Federal Power Act vests the Commission with such power by reason of the Act's similarity to the Interstate Commerce Act, 49 U.S.C. §§1, *et seq.* Assuming that the jurisdictional language of the two statutes were parallel, it would follow from River Cities' argument concerning application of the doctrine of *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342 (1914),[6] that the Commission had in effect been granted the power to modify state regulated retail rates whenever necessary to prevent undue discrimination between wholesale and retail rates. However, as both the Commission and AP&L have pointed out in their initial briefs (FPC Br., pp. 13-21; AP&L Br., pp. 12-13), the legislative history behind the rate discrimination provisions of the Federal Power Act makes plain that they were drafted specifically to insure that the *Shreveport* doctrine could not be applied to them.

[5] State commissions, including the Arkansas Public Service Commission, consider anticompetitive allegations in proceedings before them. See, e.g., *Southwestern Bell Telephone Co.*, 10 P.U.R.4th 323 (1975).

[6] Hereinafter, *Shreveport* doctrine.

Section 3 of the Interstate Commerce Act, as quoted in the *Shreveport* case, states:

> Sec. 3. That is shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality . . . . (234 U.S. at 355-56)[7]

River Cities argue that the "subject to" clause in this provision has the "exact same legal effect" (River Cities Br., pp. 9-10) as the "subject to" clause in §205(b) of the Federal Power Act, which reads:

> No public utility shall, with respect to any transmission or sale *subject to the jurisdiction of the Commission*, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. (16 U.S.C. §824d(b)) (Emphasis supplied)

This argument is clearly erroneous inasmuch as the two clauses modify different objects.

The "subject to" clause of the Interstate Commerce Act modifies "common carrier". Therefore, the ICC's anti-discrimination powers can only be directed at common carriers (as defined by the Interstate Commerce Act) engaged in interstate activities. However, since there is no further jurisdictional qualification, this Court held that with respect to a jurisdictional common carrier,

[7] Subsequent amendments to §3 of the Interstate Commerce Act have not substantially changed this language or its substantive effect.

the ICC could prevent any undue rate preference, whether between interstate rates or between interstate and intrastate rates, which are fixed initially by the applicable state authority.

In the Federal Power Act, however, the "subject to" clause does not modify "public utility", which is by definition a person operating facilities subject to the jurisdiction of the Commission, but instead modifies the phrase "with respect to any transmission or sale". This is made even clearer when the definition of "public utility", defined by §201(e) of the Act, is superimposed on §205(b), so that it would read:

> No [person who owns or operates facilities subject to the jurisdiction of the Commission under this Part] shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, . . . (2) maintain any unreasonable difference in rates, . . . between classes of service.

Thus, in addition to limiting the Commission's anti-discrimination powers to public utilities operating in interstate commerce, the Commission is further restricted to remedying discrimination only as between transmissions or sales subject to the jurisdiction of the Commission. By inserting this second jurisdictional qualification, it is apparent, as manifested by the legislative history of §205(b), that Congress intended to protect state regulated retail rates from modification by the Federal Power Commission.[8]

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[8] River Cities are also alone in arguing that the legislative history of the Act supports the thesis that Congress may have given the Federal Power Commission powers over intrastate activities coextensive with that of the ICC under the *Shreveport* doctrine. Both the court of appeals below (Petition, App. A, p. 15a) and Conway (Conway Br., p. 35) recognize that the Commission has no power to modify state regulated retail rates.

Concomitantly, the Commission has no power to remedy cross-jurisdictional price squeezes without jeopardizing or, in some cases, surrendering its Congressional mandate to set wholesale rates independently of state policies. As this Court stated in *Houston, E. & W. T. R. Co.* v. *United States*, *supra* at 355, in deciding that the Interstate Commerce Act delegated to the ICC the authority to modify intrastate rates:

> It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

In attempting to show inconsistency on the part of the Commission, Conway advances the misleading argument that the Commission's natural gas curtailment program, which requires the elimination of discrimination in pipeline gas allocations among the customers of an interstate natural gas pipeline, is an analogous situation to the case at bar (Conway Br., pp. 37-38). Gas curtailment policies, however, which are administered under jurisdictional grants contained in the Natural Gas Act, 15 U.S.C. §§717-717w, depend on entirely different jurisdictional foundations. Under the Natural Gas Act, direct sale (retail) gas customers of interstate natural gas pipelines are nonjurisdictional for ratemaking purposes just as retail electric customers are nonjurisdictional

under the Federal Power Act (15 U.S.C. §§717c(b) and 717d(a)). In other words, rates for direct retail sales of natural gas by interstate pipelines are state regulated and the Commission has never purported to exercise any rate reviewing power over them to remove alleged discrimination between wholesale and direct sale rates.

In clear distinction to the ratemaking situation, for purposes of allocating the nation's remaining natural gas supplies between wholesale customers[9] and direct sale customers[10] of gas pipelines, this Court has held in *Federal Power Commission* v. *Louisiana Power & Light Company*, 406 U.S. 621 (1972), that the Commission's "transportation" jurisdiction under the Natural Gas Act allows it to allocate gas deliveries to all customers receiving gas in interstate commerce whether at wholesale or retail. In so deciding, the Court observed:

> . . . though the Act's application to "sales" is limited to sales of interstate gas for resale, the Act applies to interstate "transportation" regardless of whether the gas transported is ultimately sold retail or wholesale . . . Curtailment regulations are not *ratesetting* regulations but regulations of the "transportation" of natural gas . . . . (406 U.S. at 636-638)

Therefore, since it is clear that ratemaking under the

[9] These customers are usually gas distribution companies which purchase gas at the Commission regulated wholesale rate and resell it at state regulated rates to their own customers. Typically, gas distribution companies service residential and small commercial customers, as well as some industrial customers.

[10] These customers are usually large industrial customers which purchase natural gas for their own consumption at rates not set by the Federal Power Commission.

Natural Gas Act and the regulation of interstate transportation of natural gas depend on independent grants of jurisdiction, no inconsistency with the Commission's limited authority to remedy price discrimination under either the Natural Gas Act or the Federal Power Act is present.

III. THE FPC'S ESTABLISHED PROCEDURES PROTECT WHOLESALE CUSTOMERS FROM PRICE SQUEEZES CREATED AS A RESULT OF EXCESSIVE WHOLESALE RATES.

Conway suggests that if the decision below is reversed, AP&L and other large power companies will enjoy virtually an unrestricted right to subject wholesale customers to cross-jurisdictional price squeezes.[11] This argument ignores present Commission ratemaking concepts and procedures which, although not expressly designed for the purpose of removing cross-jurisdictional

[11] Conway states, for instance, that ". . . the FPC has encouraged those electric utilities with wholesale customers to file inflated 'costs of service' based upon any projected costs they desire, and any experimental methodology they can find a witness to sponsor . . ." (Conway Br., p. 16). Likewise, Conway declares that "a public utility can easily discriminate against the wholesale customers . . . which it seeks to drive from the business . . . by choosing the timing and form of filing to take advantage of the FPC's apparent willingness to create by its policy 'costs of service' that no state commission would allow" (Conway Br., p. 17). Finally, Conway states that "[t]he Commission urges that it has somehow, by non-user, lost its power to prevent discrimination" (Conway Br., p. 36).

price squeezes, nevertheless insure that the anticompetitive conduct alleged in this proceeding would not be possible to sustain.

Assuming *arguendo* that a power company intends to impose a price squeeze on its wholesale customers, it either must file for excessive wholesale rates before the Commission or file for voluntarily depressed retail rates before its state agency.[12] If the power company files for wholesale rates in excess of any lawful level, the Commission's pre-hearing summary procedures protect against its gaining undue market advantage over its wholesale customers. These discretionary powers include: the power of the Commission to reject any material submitted for filing which "patently fails to substantially comply with the applicable requirements." (18 C.F.R. §35.5)[13]; the Commission's right to suspend the effectiveness of a new rate filing for a maximum of five months (16 U.S.C. §824d(e)); and whenever it becomes apparent that any portion of a requested increase is invalid as a matter of law or policy, the power to summarily dispose of that portion of the rate increase,

[12] As AP&L discussed in its initial brief (AP&L Br., p. 16), AP&L's wholesale customers could independently create a price squeeze, either intentionally or unintentionally, by the design of their own retail rate levels.

[13] This standard applies not just to procedural matters but to substantive matters as well. Thus, an electric rate application requesting an increase in rates of any magnitude may be rejected for failure to provide supporting cost of service data or for a lack of testimony describing the proposed change in rates and the reasons for the change. See 18 C.F.R. §35.13 for the type of information which must accompany any rate change application.

order an immediate reduction of rates, and require appropriate refunds to ratepayers with interest (presently 9% per annum). Thus, despite Conway's distorted view of the regulatory process, the Commission does not "encourage" (Conway Br., p. 16) utilities to file inflated costs of service clearly inconsistent with established standards.[14]

In view of these pre-hearing procedures and the Commission's fundamental principle that wholesale rates must be based on wholesale costs, no utility can maintain a price squeeze by filing for an excessive wholesale rate. The Commission's established costs of service pricing

[14] See the Commission's "Order Granting Motion For Summary Disposition And Ordering Refunds" in *Georgia Power Company*, (FPC Docket No. E-9091, August 5, 1975), appeal pending, *Georgia Power Co.* v. *Federal Power Commission*, D.C. Cir. No. 75-1940 (October 3, 1975), in which the Commission required, without waiting for the outcome of a formal hearing, the utility to file lowered rate schedules reflecting the exclusion of construction work in progress from its rate base. The Commission has taken similar action in numerous other cases. See also "Order[s] Granting Summary Disposition And Ordering Refunds" in *Northern States Power Company*, (FPC Docket No. E-9148, October 14, 1975), and *Philadelphia Electric Company*, (FPC Docket No. E-9388, September 26, 1975). Similarly, in *Municipal Light Boards of Reading & Wakefield* v. *Federal Power Commission*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), the court of appeals stated:

> There are occasions when an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of fact is involved, but only a question of law or administrative policy of such a nature that there is neither a dispute as to the material facts nor a need to ventilate the underlying facts to aid in policy determination.

concepts provide an inherent "first line of defense" (*Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747 (1973)) against wholesale rates rising to a level in conflict with adequate retail rates.[15]

---

[15] A power company's only alternative, if it seeks to maintain a price squeeze, is to voluntarily depress its retail rates, as River Cities assert was done in this case (River Cities Br., p. 7). As APPA has observed, however, in direct contravention to River Cities' assertion:

> Since retail sales, here, as elsewhere, produce more than ten times the total revenues produced by wholesale sales, it would seem odd for a company to commit financial suicide by voluntarily depressing its retail rates below a reasonable rate of return on common equity, just to get rid of its pesky wholesale customers. Burning down the house to roast the pig, or drowning the dog to get rid of the fleas, is not normally good business practice. (APPA Br., p. 22)

CONCLUSION

For the foregoing reasons, and for those presented in AP&L's Initial Brief, it is respectfully submitted that the Court should reverse the decision reached by the court of appeals, and find that the Federal Power Commission does not have the statutory authority under the Federal Power Act to adjudicate allegations of discrimination between jurisdictional interstate wholesale rates and nonjurisdictional retail rates for the sale of electricity.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION,
Petitioner

v.

CONWAY CORPORATION, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE CITIES OF BATAVIA, GENEVA, NAPERVILLE, ROCK FALLS, ST. CHARLES, AND ROCHELLE, ILLINOIS

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BRIEF AMICUS CURIAE OF THE CITIES OF BATAVIA, GENEVA, NAPERVILLE, ROCK FALLS, ST. CHARLES, AND ROCHELLE, ILLINOIS

Pursuant to Rule 42 of this Court, the Cities of Batavia, Geneva, Naperville, Rock Falls, St. Charles, and Rochelle, Illinois (herein called "River Cities") respectfully submit this brief amicus curiae in opposition to the position of the Federal Power Commission.[1]

---

[1] Pursuant to Rule 42.2 of this Court, the written consent of all parties to the case has been obtained and filed with this brief.

Interest of Amicus Curiae

The River Cities are affected by the outcome of this proceeding. In 1970, Commonwealth Edison Company of Chicago (herein called "Edison"), one of the largest electric distribution companies in the world, filed a unilateral wholesale rate increase against the small River Cities at the Federal Power Commission under Section 205 of the Federal Power Act. In its filing, Edison increased the wholesale rates to the River Cities (under Rate 78) above the level of its retail rate for large industrial service (Rate 6). The River Cities contended before the Federal Power Commission that the disparity between the wholesale Rate 78 and the Company's large industrial Rate 6 discriminated against the Cities and precluded them from competing effectively with Edison for industrial as well as other retail customers in the area. The matter was thoroughly tried before Presiding Administrative Law Judge Ellis of the Federal Power Commission, who issued an initial decision on November 29, 1972,[2] ruling that Edison was discriminating against the municipals in violation of Section 205(b) of the Federal Power Act and ordering the wholesale rate (Rate 78) reduced to the level of Edison's industrial rate (Rate 6). On appeal by Edison to the full Federal Power Commission, the Commission reversed on the ground, *inter alia*, that the Commission lacked jurisdiction to protect wholesale customers served by a regulated utility under the Federal Power Act from discrimination resulting from the intrastate activities of that Company in setting its large industrial rates. *Commonwealth Edison Company*, 51 F.P.C. 86 (1974). The River Cities appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit,[3] which has stayed further action on the appeal

[2] Commonwealth Edison Co., 51 F.P.C. 86, 98 (1974).

[3] Batavia v. FPC, No. 74-1411 (D.C. Cir., filed Apr. 9, 1974).

pending the outcome of this Court's review of the case now before it, *FPC* v. *Conway Corporation*.[4]

Not only do the River Cities, petitioning as amicus curiae herein, have a vital interest in the outcome of the present case because it will likely govern the result of their pending appeal before the United States Court of Appeals on a similar issue below, but the impact and importance to the River Cities of the FPC's position recently has been greatly increased. For many years, Commonwealth Edison had kept its large industrial rate (Rate 6) and its wholesale rate to the River Cities (Rate 78) in tandem, with the wholesale rate being slightly higher. That was the issue involved before the Federal Power Commission in FPC Docket No. E-7578, to which Presiding Administrative Law Judge Ellis rendered his Initial Decision. However, after the FPC's decision declining jurisdiction in that case, Commonwealth Edison in 1974 instituted a new wholesale rate increase for the River Cities (FPC Docket No. E-9002) which completely abandoned the historic tracking of the two rates and greatly increased the wholesale customer rate level (Rate 78) above the industrial (Rate 6) level. The result has been that many of the Cities were forced to raise their retail rates above the retail rates of Commonwealth Edison, and/or be subject to a serious squeeze on their traditional earnings. Thus, in the absence of a decision upholding the jurisdiction of the Federal Power Commission to prevent discriminatory practices such as those directed against the River Cities by Commonwealth Edison Company, there will be a regulatory gap and no administrative remedy available for the protection of the River Cities or others similarly situated.

[4] No. 75-342; before this Court pursuant to a writ of certiorari issued to the District of Columbia Circuit to review the decision in Conway Corp. v. FPC, 510 F.2d 1264 (D.C. Cir. 1975).

Summary of Argument

I. The FPC does have jurisdiction under the Federal Power Act, 16 U.S.C. §§ 824 *et seq.* to remedy discrimination against interstate commerce from intrastate activities of a regulated utility. In support of its argument that it does not have jurisdiction, the FPC places great reliance on selected portions of the legislative history of the Act which purportedly indicate a congressional intent to preclude the *Shreveport* (*Houston, East & West Texas Ry.* v. *United States*, 234 U.S. 342 (1914)) doctrine from applying to federal regulation of electric utilities. However, the case before this Court is factually distinguishable from *Shreveport* and therefore the Commission's argument is irrelevant.

Even if the *Shreveport* issue were relevant, the plain language of Sections 205(b) and 201(b) of the Federal Power Act does not support the contention that FPC jurisdiction to remedy discrimination against interstate commerce is limited significantly more than the jurisdiction conferred upon the ICC by Sections 3 and 1 of the Interstate Commerce Act as construed by this Court in *Shreveport*.

Additionally, the legislative history of the Federal Power Act does not compel a conclusion different from what the plain language of the Act suggests. The Commission's reliance upon statements of an individual Congressman, or witnesses before Congressional hearings, which suggest a contrary result is not entitled to any weight. In fact, the legislative history more logically may be interpreted as supporting a clear grant of *Shreveport* scope jurisdiction to the FPC. Interpreting the Act in any other way would have the effect of creating a serious regulatory gap.

II. The FPC is obliged to consider the anticompetitive effect of non-regulated matters on interstate commerce. Failure to consider such conduct not only is contrary to

the broad mandate of both the Federal Power Act and the antitrust laws to preserve competition, but has the effect, as mentioned above, of creating a regulatory gap. The fact that the FPC might not be authorized to *regulate* certain conduct which affects jurisdictional matters does not justify its ignoring the anticompetitive activity when setting jurisdictional rates.

III. The specific relief requested and granted below is a proper means of eliminating an anticompetitive price squeeze. The reduction of jurisdictional rates to eliminate a price squeeze created by depressed non-jurisdictional rates can not be considered unjust or unreasonable. It certainly is not improper to eliminate an anticompetitive price squeeze by setting a jurisdictional rate at a lower level, but one which still falls within the zone of reasonableness. In such a case the customer is protected from the injury of the price squeeze, and it cannot be said that the utility is suffering if the rate still falls within the zone of reasonableness. In delimiting the zone of reasonableness, the voluntary action of a utility in maintaining a comparable non-jurisdictional rate at a low level suggests that it is a reasonable level and should have great weight in deciding whether it is unreasonable to reduce the higher rate.

Additionally, it also is not improper to set the rate at an apparent confiscatory level if such action is necessary to eliminate the anticompetitive effect of predatory pricing by a utility.

ARGUMENT

I

THE FEDERAL POWER COMMISSION HAS THE AUTHORITY AND JURISDICTION TO REMEDY ESTABLISHED DISCRIMINATION BETWEEN JURISDICTIONAL RATES AND NON-JURISDICTIONAL RATES WHICH AFFECT JURISDICTIONAL RATES.

It is clear from the decision of the Court below[5] and the brief filed by the Commission with this Court that the relief sought by the muncipalities was action by the Commission to reduce the proposed *wholesale* rates to eliminate the price squeeze created by depressed non-jurisdictional rates. There is no question of relief in the form of Commission action to raise intrastate rates. Yet when looking to the legislative history of the Federal Power Act, the Commission finds significance in the concern of certain legislators over the implications of this Court's decision in *Houston, East & West Texas Ry.* v. *United States*, 234 U.S. 342 *(Shreveport)* to the remedial powers accorded the Commission in the proposed Power Act.[6] In *Shreveport* the Court found Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1) to be sufficiently broad to permit the ICC to remedy discrimination existing between interstate rates and intrastate rates by ordering an increase in intrastate rates.[7]

---

[5] 510 F.2d at 1267.

[6] FPC Brief at 14.

[7] The Court first looked to the powers of Congress to regulate comerce and concluded:

> It is also clear that, in removing the injurious discrimination against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.
>
> Having this power, Congress could provide for its execution through the aid of a subordinate body . . . .

234 U.S. at 355. The Court then examined the specific language of the Act and concluded it was sufficiently broad to embrace and authorize the Commission act. *Id.* at 356.

The clear impact of the legislative history exchange relied on by the FPC (Br. 15-18) is that under the proposed act the Commission would not raise confiscatory intrastate rates nor would it permit interstate rates to rise above a just and reasonable level to offset the confiscatory intrastate rate. However, to appreciate the significance of these exchanges it is particularly important to bear in mind that the hypothetical posed by Congressman Pettengill (FPC Br. 15-16) involved a utility with non-jurisdictional rates *fixed* by a state Commission at a confiscatory level. Obviously, it is presumed that the utility would not want the rates at this level and therefore the proper procedure for the Company would be to remedy the situation in Court. It is an entirely different situation when the lower non-jurisdictional rates are voluntarily depressed by the Company.

Further, it is apparent that the exchange at pages 17 and 18 of the Commission's brief is concerned with the FPC *establishing local rates.* The issue now before this Court does not extend to that level. It is not alleged that the Municipalities are being discriminated against because they are not accorded rates identical to confiscatory intrastate rates *imposed* upon the utility by a state regulatory body. Rather it is charged that the utility has *voluntarily* depressed or elected to maintain depressed intrastate rates for the illegal purpose of removing the

interstate customer as a competitor. Such conduct is directly relevant to the reasonableness of the interstate rates and should be considered by the Commission. Thus, the legislative history cited by the Commission simply is not relevant to this case.

Since no relief is sought in the present case to reduce or affect intrastate rates, the *Shreveport* case is irrelevant and need not be considered. The *holding* of the Court below was that the Commission had interpreted its jurisdiction too narrowly. In the process of reaching its decision, the Court noted in *dicta* the Commission's contention that the *Shreveport* doctrine did not apply to the Federal Power Act and the selective portions of the legislative history which the Commission presented to support its contention.[8] The Court did not hold that the *Shreveport* doctrine did not apply to the Federal Power Act but rather concluded that it was not necessary to determine if *Shreveport* applied since

> [t]he "power over intrastate rates" and "the extension [of Federal control] into intrastate activities" that the *Shreveport* case permitted to the ICC goes far beyond the relief sought by petitioners. . . .[9]

However, the Commission appears to be basing the heart of its appeal on some slender threads garnered from the legislative history of the Federal Power Act relating to the *Shreveport* case. It is clear that the Commission is in error. The plain language of the Federal Power Act, its legislative history and Congress' clear desire to close the existing regulatory gap make it clear that the Commission has jurisdiction to remedy the discrimination complained of in the present case.

---

[8] 510 U.S. at 1271.

[9] *Id.*

A. The Plain Language of Section 205(b) of the Federal Power Act Broadly Prohibits Any Undue Discrimination Being Undertaken by Regulated Utilities.

The pertinent language of the Federal Power Act, 16 U.S.C. § 824 *et seq.*, is parallel with the earlier language of the Interstate Commerce Act, which was held by the Supreme Court in *Shreveport* to have vested in the ICC all powers necessary to eliminate all undue discrimination being undertaken by regulated utilities. Section 205 (b) of the Federal Power Act, 16 U.S.C. § 824d, expressly provides as follows:

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Section 3 of the Interstate Commerce Act, as quoted and construed in *Shreveport* as vesting in the ICC Congress' constitutional authority to prevent discriminatory intrastate activities against interstate commerce is indistinguishable:

> "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[10]

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[10] 234 U.S. at 355-56.

The FPC seeks to argue that the words in Section 205 (b) "with respect to any transmission or sale of electricity subject to the jurisdiction of the Commission" distinguishes Section 205(b) from Section 3. However, the words of Section 3, that it shall be unlawful for any common carrier "subject to the provisions of this Act" to engage in activities similar to those described in Section 205(b) have the exact same legal effect. In both cases, the reference is to jurisdictional provisions in other sections of the respective Act. The parallelism between the other language of Section 3 of the Commerce Act and 205(b) of the Power Act is also clear; in both cases the language clearly does not bar the regulatory agency from protecting the interstate commerce subject to its jurisdiction from discrimination by intrastate activities of the regulated companies. If Congress had so intended to restrict either Section 3 or 205(b) solely to activities in interstate commerce it could have limited the jurisdiction to remove discrimination solely to classes of service subject to the jurisdiction of the Commission.

Similarly, the plain language of Section 201 of the Federal Power Act, relating to the FPC's jurisdiction, is substantively the same as Section 1 of the Interstate Commerce Act, authoritatively construed in *Shreveport* as vesting in the ICC Constitutional power under the Commerce Clause to regulate intrastate activities discriminating against interstate commerce. The language of both Sections is almost identical and is indistinguishable in substantive effect. Section 1, par. (1) of the Commerce Act states that it applies to "the transportation of passengers or property . . . from one State . . . to any other State. . . ."[11] Section 201(b) of the Federal Power Act contains an identical grant of power over the "transmission of electric energy at wholesale in interstate commerce." Section 1, par. (1) of the Commerce Act also provides that the "provisions of this chapter shall apply to common carriers engaged in" interstate commerce, and parallels the reference in Section 201(b) of the Federal Power Act to "all facilities for such transmission or sale of electric energy."[12]

[11] 49 U.S.C. § 1(1).

Finally, both Section 201(b) of the Power Act and Section 1, par(2) of the Commerce Act contain identical provisos stating they shall not apply to solely intrastate activities. But as the Supreme Court held in *Shreveport*, these provisions did not bar the exercise of regulatory authority to prevent "unjust discrimination" by intrastate activities against interstate commerce, a matter completely different from any general authority to set intrastate rates.

Thus, an analysis of the plain language of Sections 205(b) and 201(b) of the Federal Power Act in relation to Sections 3 and 1 of the Interstate Commerce Act, as earlier construed by the Supreme Court in the leading *Shreveport* case, establishes clearly that the jurisdiction conferred by both is substantively identical in the transportation-transmission and subject-company provisions. Since Congress in enacting the Power Act used the same substantive language contained in the Commerce Act as construed in *Shreveport*, it could have intended a similar grant of its Constitutional powers to protect interstate commerce from discriminatory intrastate activities by regulated utilities.

B. The Legislative History of the Federal Power Act Clearly Supports FPC Jurisdiction To Prevent Undue Discrimination.

The portion of the legislative history upon which the Commission places its full reliance consists merely of the statements of witnesses (who were not members of Congress) before Congressional Committees, and a ran-

[12] 16 U.S.C. § 824(b).

dom comment of a single Congressman as to their personal interpretation of the applicability of the then proposed amendment to the Federal Water Power Act.[13]

This Court has held that statements by witnesses should not be accorded any weight in interpreting the meaning or scope of a statute:

> *Nor do we think of significance* the fact relied upon here and by the court below that *statements inconsistent with the conclusion which we reach were made to committees of Congress* or in discussions on the floor of the Senate by senators who were not in charge of the bill. For reasons which need not be restated, such individual expressions are without weight in the interpretation of a statute. See *Duplex Co.* v. *Deering*, 254 U.S. 443, 474; *Lapina* v. *Williams*, 232 U.S. 78, 90; *United States* v. *Trans-Missouri Freight Assn.*, 116 U.S. 290, 318.[14] (Emphasis added.)

Additionally, the Court of Appeals for the Second Circuit concluded in *Duquesne Warehouse Co.* v. *Railroad Retirement Board*, 148 F.2d 473, 488 (2d Cir. 1945):

> Appellee stresses the testimony of witnesses before Congressional committees as showing that the purpose of Congress was not to include such a company within the Act. But it has never been held that such testimony constitutes part of the legislative history bearing on the legislative intention." (Citations omitted.)

The one statement by a Congressman, i.e. Representative Cole, which the Commission cites is on its face purely an individual opinion:

> [W]e have *tried*—and I *think* successfully—to avoid the injection into the Federal control, which this

[13] FPC Brief at 15-18.

[14] McCaughn v. Hershey Choc. Co., 283 U.S. 488, 493-94 (1931).

> title confers, the extension thereof into intrastate activities in the way that the Shreveport case might permit.[15] (Emphasis supplied.)

This Court has warned against placing undue reliance on the statements of individual Congressmen concerning the meaning of a statute:

> There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. (Citations omitted.)
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.[16]

In addition, it is of importance to note that the Public Utility Act of 1935 contained two parts: Title I was entitled "Control of Public Utility Holding Companies," i.e., the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79, *et seq.*; and Title II was entitled "Amendments to Federal Water Power Act," i.e., the Federal Power Act, 16 U.S.C. § 824, *et seq.* These two parts of the same Act were considered and passed together in both Houses of Congress. The Holding Company portion of the Act (Title I) gave even more freedom from federal regulation in its explicit terms to intrastate ac-

[15] 79 Cong. Rec. 10384 (June 28, 1935).

[16] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318-19 (1897); *accord*, McCaughn v. Hershey, *supra*, note 14.

tivities than did Title II, the Federal Power Act portion. This more lenient treatment in Title I was specifically noted during the Senate floor debate by Senator Barkley:

> Mr. BARKLEY. Mr. President, if the Senator from Montana will yield in that connection, let me say that the bill provides for exemption only under title I. Title II is the part of the bill which provides that rates and practices in the transmission of power and electric energy across State lines may be regulated. That is entirely different. We do that with respect to railroads which are almost entirely intrastate, but we can regulate their practices insofar as interstate traffic is concerned. We provide here not only for the exemption of companies which are wholly engaged within a State in the transmission of power and electric energy but even where there is an integrated company in two or more States in contiguous territory we provide that it likewise may be exempted from the provisions of title I. That, of course, does not apply to the regulation of the transmission of electric power across State lines, which is entirely different from the provisions of title I.
>
> The bill provides that even a holding company may continue to operate if it operates wholly within a State, or if it operates in half a dozen States in a contiguous territory so that its properties may be regarded as a system of utilities that have something in common.[17]

In the House, the Public Utility Act of 1935 was the product of the Committee on Interstate and Foreign Commerce. When the Act was reported to the House floor, Congressman Eicher, a member of that Committee, presented an analysis of Title I in which he agreed with Senator Barkley's interpretation of Title

[17] 79 Cong. Rec. 8442 (May 31, 1935); *accord*, statement by Senator Wheeler, 79 Cong. Rec. 8393-94 (May 29, 1935).

I, but he nevertheless concluded that the *Shreveport* doctrine applied:

> *The only companies regulated by the bill are those engaged in interstate commerce.* This appears from an analysis of several sections of the statute. Section 11 applies only to registered holding companies. Section 5 allows any holding company to register, and section 4 provides that unless a holding company is registered under section 5 it shall be unlawful for it to transmit through the mail or by any instrumentality of interstate commerce utility assets, sales or service contracts, or securities, or to engage in any business in interstate commerce. Thus, if a company does not engage in any interstate commerce it need not register and would not come within section 11. Moreover, the Securities and Exchange Commission, which is to administer this portion of the act, is required by section 3(a) to exempt any holding company from the provisions of title I of the act, if it deems the exemption not detrimental to the public interest when such holding company is "predominantly intrastate in character" and carrying on its business and the business of its subsidiary companies substantially in a single State. The exemptions granted to such companies would, of course, free them from the provisions of section 11. *It is clear, therefore, that intrastate transactions are in no wise sought to be affected unless they should be so intertwined with interstate transactions that "the government of the one involves the control of the other," in which event it is for Congress to prescribe the dominant rule under Houston, etc., Co. v. United States (234 U.S. 342).*[18] (Emphasis added.)

Thus, if Title I of the Public Utility Act of 1935, which by its express terms asserts less jurisdiction over intrastate activities than Title II, is governed by the *Shreveport* doctrine, then it follows that Title II of the

[18] 79 Cong. Rec. 10359 (June 28, 1935).

same legislation, i.e., the Federal Power Act, also could be interpreted as retaining the *Shreveport* command that when intrastate actions discriminate against and cause injury to the interstate market, the Federal Power Commission has the authority and duty to regulate the intrastate market to the extent necessary to eliminate the discrimination. Hence, at the very least the FPC may take the intrastate rate being charged by a utility into account when setting the interstate rate.

C. The Exercise of Jurisdiction by The FPC Is Necessary and Proper to Prevent A Regulatory Gap.

The key motivating force behind enactment of the Federal Power Act was the need to create a Federal authority to fill in the gaps in State regulatory powers. Efforts by the States to enact any regulation affecting interstate transportation, even to protect discrimination against intrastate activities, were forbidden under the Commerce Clause. *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924). In *Kansas Natural Gas* the Court emphasized this limitation on state authority by quoting from *Simpson* v. *Shepard*, 230 U.S. 352 (1912) wherein Mr. Justice Hughes, speaking for the Court, said:

> "If a state enactment imposes a *direct burden* upon interstate commerce, it must fall, regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which, in the absence of the Federal regulation, should be free".[19] (Emphasis in original.)

Three years later, in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), this Court found the holding of *Kansas Natural Gas*, also to be controlling over state attempts to regulate interstate electric transportation. The Court specifically

[19] 265 U.S. at 307-8.

concluded that "[t]he forwarding state obviously has no more authority than the receiving state to place a direct burden upon interstate commerce." [20]

Since the Commerce Clause included, under the Supreme Court's holding in *Shreveport*, the protection of interstate transportation from intrastate activities, it was crystal clear prior to 1935 that the entire subject of discrimination between intrastate and interstate commerce was a federal question within the exclusive power of Congress. Thus, when Congress came to enact the Public Utility Act of 1935, it was clearly established that the States lacked any authority to correct any discriminatory practices of intrastate activities on interstate commerce. Hence, the purpose of the Federal Power Act, like the Natural Gas Act passed three years later in 1938, was and is to grant the Federal Power Commission jurisdiction over *all* matters about which the states are precluded from taking action.

This Court recently has reaffirmed this purpose when it declared in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972), a case involving the Natural Gas Act:

> Although federal jurisdiction was not to be exclusive FPC regulation was to be broadly complementary to that reserved to the States, so that there would be no "gaps" for private interests to subvert the public welfare.

Thus, in order to protect the interstate consumers, the FPC was granted the authority by Congress to close all "gaps" where state regulation is not feasible. Furthermore, where the question of jurisdiction is a close one, this Court has mandated that FPC jurisdiction be found in order to avoid the creation of a regulatory gap:

[20] 273 U.S. at 89.

This congressional blueprint has guided judicial interpretation of the broad language defining FPC jurisdiction, and "when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. Compare Guss v. Utah Labor Board, 353 U.S. 1. *That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.*" FPC v. Transcontinental Gas Pipe Line Corp., [365 U.S. 1], at 19-20 . . . .[21] (Emphasis added.)

II

THE ANTI-DISCRIMINATION PROVISIONS OF THE FEDERAL POWER ACT MUST BE READ AND ADMINISTERED IN LIGHT OF THE POLICIES OF THE FEDERAL ANTITRUST LAWS.

A. Sections 205 and 206 of the Federal Power Act Incorporate the Principles of the Federal Antitrust Laws Whereby the Commission is Required to Consider the Anticompetitive Impact of Discriminatory Rates.

It is well established that the policies of the federal antitrust laws are incorporated into the Federal Power Act,[22] and that said policies must be recognized in its administration.[23] With particular regard to Sections 205

[21] 406 U.S. at 631.

[22] *Gulf States Util. Co.* v. *FPC*, 411 U.S. 747 (1973). *See also Lafayette, La.* v. *SEC*, 454 F.2d 94 (D.C. Cir. 1971), *aff'd sub nom. Gulf States Util. Co.* v. *FPC*, 411 U.S. 747 (1973); *Municipal Elec. Ass'n* v. *SEC*, 413 F.2d 1052 (D.C. Cir. 1969).

[23] This responsibility is hardly novel. In numerous instances courts have held that administrative agencies, including the Federal Power Commission, must give consideration to these policies and make findings of fact and conclusions of law with respect thereto

and 206 of the Act, this Court concluded that in the disposition of rate matters arising under these provisions, the Commission must consider the anticompetitive impact of wholesale rate filings by electric utilities. In *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 (1973) this Court stated:

> The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies. See S. Rep. No. 621, supra, at 11-12; Utility Corporations—Summary Report, 70th Cong, 1st Sess, S Doc No. 72, Part 73-A, 47-54; 79 Cong Rec 8392 (1935).
>
> In order to achieve federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit II was enacted. S Rep No. 621, supra, at 17; HR Rep No. 1318, supra, at 7. Part II of Tit II was denominated the Federal Power Act, 49 Stat 863. *Title II* certainly did not preclude the operation of the antitrust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. See Otter Tail Power Co. v. United States, 410 US 366, 35 L Ed 2d 359, 93 S Ct 1022 (1973); Meeks Concentration in the Electric Power Industry: The Impact of Antitrust

in the disposition of matters arising before them. *See*, e.g., *FMC* v. *Aktiebolaget*, 390 U.S. 238, 243-46 (1968); *Denver Rio Grande Western R.R.* v. *United States*, 387 U.S. 485, 492-98 (1967); *United States* v. *El Paso Nat. Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *California* v. *FPC*, 369 U.S. 482, 484-85 (1962); *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944); *Sabin* v. *Butz*, 515 F.2d 1061, 1069 (10th Cir., 1975); *Marine Space Encl.* v. *FPC*, 420 F.2d 577 (D.C. Cir., 1969); *Northern Nat. Gas Co.* v. *FPC*, 399 F.2d 953 (D.C. Cir., 1968); *Pittsburgh* v. *FPC*, 237 F.2d 741 (D.C. Cir., 1956).

Policy, 72 Col L Rev 64 (1972). *This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to §§ 202 and 203, and under like directives contained in §§ 205, 206, and 207.*[24] (Emphasis added.)

That the Commission is obliged to consider anticompetitive rates of electric utilities may also be seen from Justice Powell's dissent in *Gulf States*. Speaking for himself, Justice Stewart and Justice Rehnquist, Justice Powell joined the majority in this regard. Justice Powell found:

> It is common ground that the Commission has a responsibility to deal with anticompetitive practices in the power industry. Section 10 of the Act, 16 USC § 803 [16 USCS § 803], provides that the Commission may issue licenses to public utilities "on the following conditions," one of which is that:
>
> "(h) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited." 16 USC § 803(h) [16 USCS § 803 (h)].
>
> *The question before the Court, then, is not whether the Commission has responsibility, but how and when it shall exercise it.*[25] (Emphasis added.)

In addition, Justice Powell noted with approval that the Commission had stated to the Court that it had also concluded that it had an affirmative statutory obligation to consider the anticompetitive effects of discriminatory wholesale rates:

[24] 411 U.S. at 758-59.

[25] *Id.* at 767-68.

> Stated abstractly, the Commission's position is that the most sensible method of regulating anticompetitive conduct is to focus on the conduct itself rather than on the means by which it may possibly be financed. *The Commission* acknowledges a duty to scrutinize allegedly anticompetitive behavior in proceedings . . . to review rates, §§ 205 and 206 of the Act, 16 USC § 824d and 824e . . . and to review a charge of unduly discriminatory rates or practices, § 205 of the Act, 16 USC § 824d. . . .[26] (Emphasis supplied.)

Action at the Commission level to investigate alleged antitrust violations provides an alternate administrative remedy to the traditional judicial remedies under the antitrust laws. As the Court noted in *Gulf States*:

> Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the im-

[26] *Id.* at 768. The Majority viewed the Commission's construction of Sections 205 and 206 in an identical light. Indeed, the only distinction between the majority and minority opinions turned on the Commission's responsibility under Section 204 of the Act, 16 U.S.C. § 824c. Writing for the Majority, Justice Blackmun found:

> Gulf and the Commission contend that antitrust considerations of the kind asserted by the Cities do not fall within the limited scope of § 204 as thus defined, and consideration by the Commission of such broad-ranging issues would be incompatible with the need for relatively fast action by the Commission when it passes upon a proposed security issue. *It is said that allegations of anticompetitive conduct properly may be raised and fully considered in other proceedings related . . . to rates and ratemaking practices under §§ 205 and 206,* 16 USC §§ 824d and 824e [16 USCS §§ 824d and 824e] . . . .
>
> Although allegations similar to those raised here may, indeed, be made in such other proceedings under the Federal Power Act, we do not regard that fact as determinative of the scope of Commission inquiry under § 204. Instead, the Commission's broad authority to consider anticompetitive and other conduct touching the "public interest" under the other sections of the Act emphasizes the breadth of its authority under the public interest standard generally and as embodied in § 204. Id. at 757-58. (Emphasis supplied.)

portant function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.[27]

To make the courts the only source of relief from predatory pricing or other forbidden conduct by utilities subject to the Commission's jurisdiction constitutes an abrogation by the Commission of its legislative responsibility in this area.

Thus, it is clear that the policies of the federal antitrust laws must be considered in the administration of the discrimination provisions of the Federal Power Act.

B. The Federal Power Commission Must Evaluate Both Jurisdictional and Comparable Non-Jurisdictional Rates When Weighing The Antitrust Implications of Rates and Charges Subject to Its Jurisdiction.

The Commission does not contend that it is without the authority to investigate aspects of a utility's non-jurisdictional operations.[28] It acknowledges the propriety of examining *costs* to evaluate the reasonableness of their allocation between jurisdictional and non-jurisdictional accounts. It is in the matter of *rates* that the Commission elects to ignore reality and determine the issue of reasonableness in a vacuum. The Commission's argument that it may not consider non-jurisdictional rates when evaluating the reasonableness of comparable wholesale rates is clearly fallacious.

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[27] *Id.* at 760.

[28] In discussing *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635 (1945) at page 26 of its Brief to this Court, the Commission states: "To be sure, *Panhandle* supports the FPC's authority to review non-jurisdictional matters when relevant to a jurisdictional function. . . "

As discussed in Section I c of this Brief, *supra*, Part II of the Federal Power Act has as one of its primary objectives the establishment of a complete scheme of regulation for the electric power industry. This objective was well stated by Federal Power Commissioner Clyde L. Seavey at congressional hearings,[29] on the proposed Federal Power Act:

> . . . [t]he particular and immediate continuing objective of this Act is the protection and advantage of the consumers of electric energy throughout the United States and the protection of those who invest in the securities of the industry.
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> • • •
>
> These purposes and objectives are to be accomplished in the following way: First, by putting into action the authority of the Federal Government in a regulation which is not now carried out by the Federal Government; Secondly, by supplementing of State authority, with the Federal authority without impinging upon the proper functions of the State authority, *and Thirdly, the coordination of the Federal and State authorities so that the full force of a complete regulation may be exerted.*[30] (Emphasis added.)

Thus, according to Commissioner Seavey, the Act was intended not to supplant state authority but to comprehensively supplement it. Fulfillment of this goal of comprehensive regulation requires each regulatory authority to fully protect the customers falling under its jurisdictional umbrella.

Another broad objective of Part II of the Federal Power Act, as recognized by the Supreme Court in *Otter Tail Power Company* v. *United States*, 410 U.S. 366, 374

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[29] Hearings on H.R. 5423 and S.1725 Before the Comm'n on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935).

[30] *Id.* at 391-92.

(1973), is the maintenance of competition to the maximum extent consistent with the public interest. In 1965 hearings before the Senate Commerce Committee, the existence of competition in the power industry and the threat it faces was well stated by the Federal Power Commission's Chairman:

> To the large privately-owned electric utility a retail customer, even a large industry, is simply a customer. However, a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a competitor in the fringe area where the two systems are contiguous, but may also be a direct or potential competitor for the commercial and industry businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.
>
> The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipal systems succumb to purchase offers by investor-owned wholesale suppliers. In this respect, wholesale rate regulation in the electric power industry is unique and faces far greater resistence by the privately-owned utilities than retail rate making . . . The Nation values its pluralistic power economy and the role therein of the independent small-systems, public, cooperative, and investor owned. The necessity for Federal regulation to assure the survival of the small and medium-sized power systems is unmistakeable.[31]

The position now advanced by the Commission is that it cannot and will not consider the interrelationship of jurisdictional and non-jurisdictional rates.[32] This posture

[31] Hearings Before the Senate Committee on Commerce, 89th Cong., 1st Sess. on S.218 (Serial #89-38, 1965) at 68.

[32] In its brief to this Court the Commission asserts that it has been consistent in its interpretation of the discrimination provisions of the Act. (F.P.C. Brief at 12). It is interesting to note, however, that in *Pacific Gas and Electric Company*, 13 F.P.C. 2006 (1954), the Commission considered intrastate wholesale rates not subject to the Commission's jurisdiction when assessing the reasonableness of an interstate wholesale rate. *Id.* at 209.

leaves utilities unfettered by regulatory control if they desire to eliminate wholesale customers as competitors through the maintenance of discriminatory non-jurisdictional rates. Thus, the Commission's posture has the effect of creating a regulatory gap which undermines its ability to protect customers subject to its jurisdiction or to maintain competition within the power industry. It has been the position of the Supreme Court to construe Federal Power Commission jurisdiction to avoid gaps in its regulatory framework.[33] Certainly in light of the clear and expressed purpose of the Act the creating of such a gap by the Commission is improper.

Additionally, this Court previously has addressed the propriety of the FPC considering the interrelationship of jurisdictional and non-jurisdiction rates when interpreting Section 5(a) of the Natural Gas Act, 15 U.S.C. §§ 717-717w.[34] In *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635 (1945), this Court expressly acknowledged the propriety of such comparisons:

> The Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its

[33] *See* United Gas Improv. Co. v. Continental Oil Co., 381 U.S. 392, 400 (1965), and discussion at pages 16-18, *supra*.

[34] The language of Section 5(a) of the Gas Act is virtually identical to the language of Section 206(a) of the Federal Power Act, and the rationale of the Court in construing the former is applicable to the latter. *See, e.g.*, FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956); Municipal Light Board v. FPC, 450 F.2d 1341 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Wisconsin Michigan Power Company v. FPC, 197 F.2d 472 (7th Cir. 1952); FPC v. Arizona Edison Co., 194 F.2d 679 (9th Cir. 1952).

> jurisdiction. For § 5(a) 15 USCA § 717d(a), 4 FCA title 15, § 717d(a) provides that whenever the Commission "shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential*, the Commission shall determine the just and reasonable rate." (Italics added) It is clear that contracts covering direct industrial sales come within that italicized clause of § 5(a).[35]

It is significant to note that in discussing the authority of the Commission to consider rates for non-jurisdictional industrial sales the Court italicized that portion of the quoted section of the Natural Gas Act which reads:

> or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential

and then explained: "It is clear that contracts covering direct industrial sales come within that italicized clause. . . ." Thus, the Court emphasized the dichotomy between the first part of the clause, which addresses "any rate, charge, or classification . . . *subject to the jurisdiction of the Commission*," and the second part, which involves findings as to *any* rule, regulation, practice, or contract affecting such rate." (Emphasis added.) The latter part, as the Court clearly points out, includes non-jurisdictional rules, regulations, practices, or contracts inasmuch as they *affect* jurisdictional rates.

In addition to this clear explanation, the Court notes in footnote 5 of the *Gulf States*' decision that pursuant

[35] 324 U.S. at 646-47.

to the authority of Section 4(c) of the Natural Gas Act the Federal Power Commission requires the filing with it of certain contracts for non-jurisdictional, direct industrial sales.[36] Section 4(c) of the Natural Gas Act, is virtually identical to the language of Section 205(c) of the Federal Power Act. Additionally, Section 5(a) of the Natural Gas Act, interpreted in *Panhandle*, *supra*, and Section 206(a) of the Federal Power Act both contain the statutory admonition to consider any "practice or contract" *affecting* jurisdictional rates. In this case the "practice" consists of maintenance of discriminatory differentials embodied in the Company's industrial retail rate contracts.

Thus, faced with a price squeeze affecting competition by customers of a jurisdictional company, the statutory language of the Federal Power Act, which parallels the Natural Gas Act, requires the Commission to devise a method to eliminate the effect of this price squeeze upon wholesale customers. This proceeding devolves from the fact that the Federal Power Commission has elected to ignore the plain language of the Federal Power Act and seeks to divest itself of its statutory authority and shirk its statutory responsibility.

[36] 324 U.S. at 646-47. The note reads in full:

> There must be filed with the Commission not schedules of rates subject to the jurisdiction of the Commission but "the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." Section 4(c), 15 USCA § 717c(c), 4 FCA title 15, § 717c(c). By Rule 54.30 the Commission requires the filing with it of all contracts for direct industrial sales involving sales in excess of 100,000 Mcf per year. See 8 Fed. Reg. 16101.

III

A UTILITY WHICH VOLUNTARILY MAINTAINS DEPRESSED INTRASTATE RATES WHICH HAVE AN ANTICOMPETITIVE EFFECT MAY BE REQUIRED TO SET INTERSTATE RATES BELOW A LEVEL WHICH OTHERWISE WOULD BE APPROPRIATE.

The relief ordered by the Court below is entirely consistent with the Commission's obligation under Section 205 of the Act to establish just and reasonable rates. Under normal circumstances just and reasonable rates would be those sufficient to recover properly-allocated costs [37] as well as provide a just return on the property dedicated to the public use.[38] However, the Commission argues that under this standard

> [w]holesale rates must recover the cost of providing wholesale service, plus a reasonable return, and *the costs incurred in providing such service do not become otherwise improper or excessive because of allegations of anticompetitive conduct in unregulated matters.*[39] (Emphasis added.)

Thus, to the FPC it is not relevant that a wholesale rate, in conjunction with a voluntarily depressed comparable non-jurisdictional retail rate, has the *effect* of destroying competition. This narrow interpretation of the mandate of Section 205 is clearly erroneous.

First, the simple fact that a utility elects to maintain or set a non-jurisdictional rate comparable to a wholesale rate at a level below the wholesale rate, constitutes

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[37] Mississippi River Fuel Corp. v. FPC, 163 F.2d 433 (D.C. Cir. 1947).

[38] FPC v. Hope Nat. Gas Co., 320 U.S. 591 (1943); Bluefield Waterworks & Improve. Co. v. Public Svc. Comm'n, 262 U.S. 679 (1972).

[39] FPC Brief at 32.

persuasive evidence that the utility considers the lower level to be just and reasonable. In *Otter Tail Power Company*, 2 F.P.C. 134 (1940), the Commission gave note to this reality when it observed:

> We point out, too, that the [utility], itself, fixed the Fergus Falls rate and there is nothing before us to show that the [utility] voluntarily undertook to serve Fergus Falls under such conditions as would result in confiscation of the [utility's] property. In this connection we are reminded, as Mr. Justice Cardozo pointed out in *Dayton Power and Light Company* v. *Public Utilities Commission*, 292 U.S. 290, 312, that:
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> > "It is a strain on credulity to argue that the appellant, when putting into effect a new schedule of charges, was satisfied with one productive of so meager a return * * * The argument proves too much; * * * Men do not transact business without protest at confiscatory rates, at all events in the absence of extraordinary circumstances making submission to the loss expedient * * *." [40]

Consequently, absent a clear showing that the disparity is justified by *costs*, it cannot be said that setting the jurisdictional rate at the lower level is unjust or unreasonable. The decision of the Court below gave cognizance to this fact when it provided:

> When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves. There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain

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[40] 2 F.P.C. at 146.

retail revenues in order to curb the retail competition of its wholesale customers.[41] [Footnotes deleted.]

Indeed, in its 1940 *Otter Tail* decision, the Commission itself recognized this possibility:

> It occurs to us that one rate in its relation to another rate may be discriminatory, although each rate *per se*, if considered independently, might fall within the zone of reasonableness. There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned. The relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed.[42]

Furthermore, in this 1940 *Otter Tail* decision, the Commission did not resort to strained legalisms to limit its jurisdiction. It instead recognized its responsibilty to interpret the Federal Power Act in such a way as to give full force and effect to its Congressional mandate to regulate interstate rates:

> Statutes should not be literally interpreted at the expense of the reason of the law and so as to produce absurd consequences or flagrant injustice. They are to be construed "so as to avoid absurd or glaringly unjust results." *Sorrells* v. *United States*, 287 U.S. 435, at 450 (1932).[43]

The position now advanced by the Commission before this Court urges an absurd result: it would require the Commission to authorize to a utility rates which, in conjunction with other rates set by the utility, would

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[41] 510 U.S. at 1274.

[42] 2 F.P.C. at 149.

[43] *Id.* at 137.

destroy competition. Furthermore, inasmuch as the higher rates imposed on wholesale jurisdictional customers by the Commission would provide profits to the utility which may be used to support the lower, predatory rates, the Commission's interpretation compels wholesale customers to subsidize the destruction of their viability as competitors.

Additionally, even if it clearly and convincingly is established that the non-jurisdictional rates are non-compensatory to the utility in that they fail to recover costs or provide a return on investment, it is not necessarily improper to set jurisdictional rates at the same level if such action is required to offset the anticompetitive effect of the lower non-jurisdictional rate. The public interest, as expressed in Sections 205 and 206 of the Federal Power Act and Section 2(a) of the Clayton Act, as amended by Section 13(a) of the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(a), must be accorded a higher priority than the economic self interest of a particular power supplier. This fundamental principle was affirmed by this Court in *Otter Tail Power Company* v. *United States*, 410 U.S. 366 (1973), a case that evolved from the refusal of the Otter Tail Power Company to deal with certain municipalities in its service area when the municipalities sought to establish public power systems. The district court had found Otter Tail's practices to be in violation of the antitrust laws[44] and had entered a broad decree designed to cure the prohibited practices and prevent their recurrence. In upholding the lower court's decision, the Supreme Court dismissed Otter Tail's expressed concern for its financial posture by noting:

> Otter Tail argues that, without the weapons which it used, more and more municipalities will turn to

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[44] United States v. Otter Tail Power Co., 331 F. Supp. 54 (1971), *modified*, 410 U.S. 366 (1973).

public power and Otter Tail will go downhill. The argument is a familiar one. It was made in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, a civil suit under § 1 of the Sherman Act dealing with a restrictive distribution program and practices of a bicycle manufacturer. We said: "The promotion of self interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." *Id.*, at 375.

The same may properly be said of § 2 cases under the Sherman Act. That Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collides with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power.[45]

Surely it is inconsistent with the above principles to permit a utility that *voluntarily* sets or maintains depressed, non-compensatory rates which have the effect of creating an anticompetitive price squeeze on wholesale customers to justify the perpetuation of the illegal discrimination by claiming economic detriment should the higher rates be lowered. Any economic loss which might follow is within the power of the utility to avoid by terminating its illegal activity. Neither Section 205 (a) of the Federal Power Act nor the decisions of this Court in *Hope* and *Bluefield* need be interpreted as requiring the Federal Power Commission to ignore the predatory pricing of a utility subject to its jurisdiction when it has at its disposal the means to remedy such conduct through the reduction of wholesale rates. It is true that the Commission has the obligation of establishing just and reasonable rates; however, they must be just and reasonable to both the utility and cus-

[45] 410 U.S. at 380.

tomer.[46] Rates which have the effect of furthering a predatory pricing policy cannot be said to be reasonable to the consumer. Conversely, rates which have the effect of countering such a policy cannot be said to be unreasonable to the utility.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should affirm the decisions reached by the Court of Appeals.

Respectfully submitted,

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[46] *See, Hope* and *Bluefield, supra* note 21.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-342

FEDERAL POWER COMMISSION, *Petitioner,*

v.

CONWAY CORPORATION, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AS AMICUS CURIAE

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INTEREST OF THIS AMICUS CURIAE

The Petitioners and the Respondent have consented to the filing of this brief by the American Public Power Association as Amicus Curiae. Our brief supports the decision below.

The American Public Power Association (hereinafter "APPA") is a national service organization representing over 1,400 local consumer-owned electric utility power systems in 48 States, Puerto Rico, the Virgin Islands and Guam. The Association's membership includes municipalities, public utility districts, rural electric cooperatives, and other consumer-owned public power systems.

Many of APPA's members purchase all or part of their electric power requirements at wholesale from public utilities subject to regulation by the Federal

Power Commission. These consumer-owned systems compete with their wholesale power suppliers for existing and potential customers. A utility, by fixing its wholesale rates to a municipality at a higher level than the utility's retail rates, can prevent that municipality from offering to industry a retail rate as low as those which the utility itself offers. This is the "price squeeze" that we are talking about in this case.[1]

QUESTIONS PRESENTED

Whether the Federal Power Commission, in adjudicating a utility's proposed rate for service at wholesale to other utilities with which it competes at the level of retail sales of electricity, is required by the

[1] The magnitude of the problem, to which many of APPA's members can attest, was well stated by a former Chairman of the Federal Power Commission in 1965:

> "To the large privately-owned electric utility a retail customer, even a large industry, is simply a customer. However, a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a competitor in the fringe area where the two systems are contiguous, but may also be a direct or potential competitor for the commercial and industrial businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.
> "The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipal systems succumb to purchase offers by investor-owned wholesale suppliers. In this respect wholesale rate regulation in the electric power industry is unique and faces far greater resistance by the privately-owned utilities than retail ratemaking. . . . The Nation values its pluralistic power economy and the role therein of the independent small-systems, public, cooperative, and investor owned. The necessity for Federal regulation to assure the survival of these small and medium-sized power systems is unmistakable." *Hearings on S. 218 Before the Senate Committee on Commerce*, 89th Cong., 1st Sess. 68 and 79 (1965).

Federal Power Act to take into consideration (1) evidence that the proposed wholesale rate is higher than the retail rate for which that same utility has sought and obtained the approval of a state regulatory commission, and (2) evidence that the discrimination thereby established prevents the purchasing utility from competing for retail business with the utility from which it purchases its supply of electricity.

If the answer is affirmative, as decided by the court of appeals, a second question is whether the Commission has authority to adjust a public utility's rate of return on common equity to be yielded by wholesale rates in order to prevent undue discrimination and anticompetitive consequences.

The present Commission, not only in the case at bar but consistently in a number of cases[2] involving APPA members, has refused permission to municipalities to offer evidence of a company's discrimination between its wholesale and retail rates and has denied permission to record offers of proof thereof to enable a proper record to be made on appeal. Its grounds are that, since FPC lacks jurisdiction over retail rates, which are within the jurisdiction of state commissions, it cannot receive evidence that the company whose application for a wholesale rate increase is before the Commission has made that rate higher than the retail rates submitted to a state commission for approval even if it is alleged that the purpose was

[2] *E.g.*, Southern California Edison Co., 50 F.P.C. 836 (1973); Florida Power & Light Co., 50 F.P.C. 1626 (1973); Order of January 3, 1974, in Union Electric Co., Docket No. E-8215; Opinion No. 681 of January 7, 1974, in Commonwealth Edison Co., Docket No. E-7578; Order of February 28, 1974, in Public Service Co. of Oklahoma, Docket No. E-8242; Order of April 19, 1974, in Wisconsin Electric Co., Docket No. E-8619.

to drive its publicly owned wholesale customer, its retail competitor, out of business in consequence of this "price squeeze."

The court of appeals decision, reversing the Commission, was a salutary one, and should be sustained.

We respectfully ask the Court's particular attention to our discussion in Part II of the remedies available to the Commission to stop the use of price as a weapon to destroy competition.

STATEMENT OF THE CASE

1. The Competitive Situation

As a "public utility" within the meaning of section 201(e) of the Federal Power Act, 16 U.S.C. § 824 *et seq.*, Arkansas Power & Light Company (hereinafter "AP&L") is subject to FPC jurisdiction. The FPC regulates AP&L's "sales for resale" to wholesale customers pursuant to sections 205 and 206 of the Act while AP&L's direct sales to retail customers are regulated by the Arkansas Public Service Commission.

The company sells power at wholesale to municipal and cooperative utilities, including the parties in this case. They purchase all, or a major portion of, their electric power requirements from AP&L and, in turn, supply electricity to their own retail customers.

Here, as is true generally, the wholesale power customers compete with their supplier for retail business, particularly prospective industrial and commercial customers. As elsewhere in the United States, the municipalities desire to attract new industrial loads within their service areas not only to obtain added electric revenues but because of attendant economic benefits, *i.e.*, new jobs created by construction, plant positions,

and service and commercial businesses. Besides the factors of favorable taxation, labor market, housing availability, and services provided by the competing utilities, the price of electric power represents a major factor in industrial plant siting.[3] Consequently, a utility offering lower retail rates than its competitor has an advantage in securing new customers.

The wholesaling utility can control competition by either depressing industrial retail rates or by increasing wholesale rates, thereby rendering the wholesale customers unable to offer competitive rates to the same prospective industrial customers. The wholesale customers here complain that the company has established wholesale rates higher than its retail rates to accomplish this very purpose. FPC seems to postulate that the company may have depressed its retail rates, instead. The wholesale customers are squeezed in this supposed regulatory gap.

In these respects, this case is a typical example of a problem repeatedly encountered by APPA's members. We say that the gap is nonexistent, that FPC has authority which it has refused to exercise.

2. Federal Power Commission Proceedings

On May 31, 1973, AP&L filed an application requesting an increased wholesale rate for the resale customers involved in this case. The Commission accepted the rate for filing but suspended the effective date for five months, the maximum suspension period authorized by the Federal Power Act.

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[3] Price of energy as a factor in determining plant sites is probably more predominant today than at any time in the Nation's history since energy costs are becoming a significant component of production cost and market price of goods produced.

The Commission, in several orders, held that it lacked jurisdiction to consider the alleged anticompetitive discrimination and that it lacked jurisdiction to order a remedy, and refused to permit the municipalities to intervene for the purpose of presenting evidence on these issues. There has been no trial. The issues presented are solely questions of law.

3. Opinion of the Court of Appeals

Upon review, the court of appeals rejected the Commission's disclaimer of authority, recognizing that

> "Through its position as supplier, AP&L will be able, if there is no FPC jurisdiction to consider the public interest in AP&L's discriminatory levels, to affect the quality and price of petitioners' retail service in such a way as to tilt the scales of competition in its favor." *Conway Corporation* v. *FPC*, 510 F.2d 1264, 1269 (D.C. Cir. 1975).

The court of appeals said that

> ". . . we see a statute that confers plenary jurisdiction to review the interstate wholesale rate and to provide relief addressed to such wholesale rate in order to further the public interest." *Id.* at 1272.

As for an appropriate remedy to cure anticompetitive discriminatory rates, the court determined that the rate of return on a wholesale rate could be adjusted within the zone of reasonableness:

> "There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers." *Id.* at 1274.

We agree.

ARGUMENT

I. THE FPC IS REQUIRED BY THE FEDERAL POWER ACT TO CONSIDER THE ANTICOMPETITIVE PURPOSE AND EFFECT OF A PROPOSED WHOLESALE RATE, AND IN SO DOING TO COMPARE THAT RATE WITH THE COMPANY'S RETAIL RATES

The case before the Court involves interpretation of the Federal Power Commission's responsibilities and duties under section 205(b) of the Federal Power Act which makes it unlawful for any public utility "with respect to any transmission or sale subject to the jurisdiction of the Commission" to

> "(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

The FPC construes its responsibilities narrowly, turning its back on the competitive problem recognized by the court of appeals. The court said:

> "The competitive context in which petitioners operate sets the stage for our analysis. In competing with supplying companies, municipal and cooperative systems seek to maintain customer satisfaction with the quality and price of their service in order to attract new industries and to retain existing customers; continued satisfaction is also necessary to ensure voter support for the municipal systems. At its most basic level, this competi-

tion represents a struggle on the part of the municipal and cooperative systems to preserve their independence from their supplier insofar as they compete at retail. 510 F.2d at 1268.

* * * * *

"Through its position as supplier, AP&L will be able, if there is no FPC jurisdiction to consider the public interest in AP&L's discriminatory levels, to affect the quality and price of petitioners' retail service in such a way as to tilt the scales of competition in its favor."[4] *Id.* at 1269.

As the court of appeals said, a "fair interpretation of the statute," considering Congress' purposes and policies, and this Court's recent decisions, reveals that the Commission has "plenary jurisdiction to review the interstate wholesale rate and to provide relief . . . in order to further the public interest." 510 F.2d at 1272. Otherwise, the statute is meaningless, and the

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[4] Another description of the problem is:

"A second, and clearer, opportunity to use pricing power anticompetitively occurs when a firm is both a wholesale supplier and a competitor for retail sales. By maintaining its wholesale price at a level that substantially disadvantages the purchasing firm in any competitive confrontation, the supplying firm can protect against forays into its territory by the customer, insure an advantage in competition for new loads . . . ."

Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 119 (1972). See also Richmond Power & Light Co. v. FPC, 481 F.2d 490, 496 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973):

"Absent such protection, I&M could offer a lower price to its industrial retail customers than Richmond would be able to offer, thereby directing new industries away from Richmond's service territory and into I&M's retail service territory. And because of concerns relating to such matters as employment and the property tax base, Richmond, a municipally owned company, had an interest in encouraging industries to locate in its service territory."

Commission's ratemaking authority[5] can be used to condone anticompetitive practices which Congress intended to prohibit.

A. The Purposes and Policies of the Federal Power Act

Congress passed the Act because of the absence of antitrust enforcement to restrain the growth and abusive activities of public utility companies. S. REP. No. 621, 74th Cong., 1st Sess. *passim* (1935). Congress sought two objectives:

"to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce."[6] *Gulf States Utilities Company* v. *FPC*, 411 U.S. 747, 758 (1973).

Congress desired to prevent restraint of competition and established "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Otter Tail Power Co.* v.

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[5] The parties in this case and the court of appeals have focused on the Commission's jurisdiction over AP&L because of "the sale of electric energy at wholesale in interstate commerce." The Act also grants authority to FPC over "the transmission of electric energy in interstate commerce." Although the question was not addressed below, in our view the "transmission" clause, identical to the "transportation" clause in the Natural Gas Act, prohibits a utility's discriminatory treatment as between direct retail customers and resale customers, when read in conjunction with section 205 of the Federal Power Act. *See* FPC v. Louisiana Power & Light Company, 406 U.S. 621 (1972); American Smelting & Refining Co. v. FPC, 494 F.2d 925 (D.C. Cir. 1974).

[6] See S. REP. No. 621, *supra* at 1-4, 17-20; H.R. REP. No. 1318, 74th Cong., 1st Sess. 3, 7-8 (1935).

United States, 410 U.S. 366, 374 (1973). In preventing abusive practices and in seeking to maintain maximum competition Congress sought to protect consumers against exploitation, affording consumers a complete, permanent and effective bond of protection from excessive rates and charges. *Sunray Mid-Continent Oil Co.* v. *FPC,* 364 U.S. 137 (1960); *Atlantic Refining Co.* v. *Public Service Comm'n of State of N.Y.,* 360 U.S. 378 (1959).

B. The Commission's Broad Authority to Preserve Competition

This Court, in response to previous FPC assertions of narrow authority jurisdiction, has told the Commission that it has "broad authority to consider anticompetitive and other conduct touching the 'public interest' . . . ." *Gulf States, supra* at 757. In that decision the Court repeatedly and emphatically instructed the Commission. It told the Commission the mandate that section 204 of the Act (relating to approval of security issues) imposes "is a broad and impressive one." *Id.* at 756. The Court noted that the Act sets forth the requirement "that the Commission consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws" (*id.* at 759) and the Commission "possesses broad regulatory authority . . . [and] is charged with responsibility for considering antitrust policy under its statute." *Id.* at 761. And, the Act "*vested the Federal Power Commission with important and broad regulatory power* in the areas described above," *i.e.,* sections 205 and 206 of the Act. *Id.* at 758. (Emphasis added.) The Court spoke of sections 204, 205, and 206 as "these adjacent" sections, implying a common thread of purpose.

Although the Commission fought its responsibility under section 204, it conceded "*that allegations of anticompetitive conduct properly may be raised and fully considered in other proceedings related to . . . rates and rate-making practices under §§ 205 and 206 . . . .*" *Id.* at 757. (Emphasis supplied.) But it now (and in many like cases) reverses that representation, and abjures any responsibility to examine allegations of anticompetitive conduct in a section 205 case, if the destruction of competition is accomplished by a "price squeeze" between two rates set by the same company, one of them being a lower retail rate. And although the dissent in *Gulf States* argued that anticompetitive allegations have no place in section 204 proceedings, Justice Powell in that dissent (joined by Justice Stewart and Justice Rehnquist) recognized that the "Commission acknowledges a duty to scrutinize allegedly anticompetitive behavior in proceedings . . . to review rates . . . and to review a charge of unduly discriminatory rates or practices." *Id.* at 768. Here the Commission has declined to do just that.

C. Application of the Act's Purpose and this Court's Instructions to the Instant Case

Examination of the Commission's narrow view reveals its incongruity. The Commission admits that it can prevent undue discrimination as between rates applicable to different wholesale customers. It seems to believe that such a situation is the whole scope of the mandate in section 205 to prevent discrimination.

But discrimination cases, involving only rates as between wholesale customers, have nothing to do with the purpose of the Act involved here, *i.e.,* to prevent anticompetitive, abusive practices, and have nothing

to do with the Commission's "important and broad regulatory power" in that field. *Gulf States, supra* at 758. If a utility sets discriminatory rates for two different wholesale customers, such conduct may be unlawful, but not on the ground involved here, *i.e.,* prohibition of a utility's creation of a competitive advantage for *itself,* by abuse of its monopoly. The Commission's "important and broad regulatory power" in order to carry out the "fundamental national economic policy expressed in the antitrust laws" (*Gulf States, supra* at 758-59) manifestly envisions more than eliminating rate discrimination in the wholesale class.

Congress intended the Commission to assure the maximum amount of competition; Congress desired to prevent abusive practices; Congress desired that the Commission "consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws" (*id.* at 759); Congress intended to check abuses of concentrated economic and political power; Congress desired protection of consumers because of the absence of antitrust enforcement; and Congress, as determined by the Court, granted the Commission broad authority to carry forth its purposes and policies.

The Commission cannot carry out Congress' policy unless it acts to prevent the type of anticompetitive price squeeze of which this case is the exemplar.

D. The FPC's Narrow View of Its Jurisdiction Is Not Supported By Precedent

The cases FPC and AP&L point to as constituting consistent interpretation of limited jurisdictional authority do nothing of the sort.

A 1940 case, *Otter Tail Power Company,* 2 F.P.C. 134, is the closest the Commission has come to the questions involved in the instant case. The *Otter Tail* case involved not just discriminatory rates among wholesale customers, but also discrimination between Otter Tail's own retail rates and its wholesale rates. There, the Commission said:

> "There is one other phase of discrimination which we should mention. Given a monopolistic position and the right to discriminate, an electric utility company is in possession of a strong and unfair weapon in its dealings with municipalities. The facts of this case point clearly to the manner in which this may come into play." *Id.* at 143.

The "facts" which the Commission spoke of were as follows:

> "It appears in large part that the reason the rates were maintained at such a high level was to force the village out of ownership of its distribution system and to require it to dispose of its facilities to the respondent . . . ." *Id.*

The Commission then noted that "this little municipality . . . finally capitulated and the respondent achieved its objective of acquiring its distribution system." *Id.* at 144.

The Commission was appalled at the company's conduct, and in what we submit was an alternate holding in the case, said (*id.* at 145):

> "The foregoing is illustrative of the conditions which may and do exist when the sole power to determine rates is left within the hands of the utility which has a monopoly of the service and when, in addition, the utility has the power to discriminate against customers in a weak bargaining position. *It clearly illustrates the reasons why*

Congress, following the pattern of the usual regulatory statutes, declared such discriminations unlawful." (Emphasis added.)

As a remedy, the Commission recognized that: "There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned." (*Id.* at 149.)

We come now to consideration of the "zone of reasonableness" concept.

II. THE COMMISSION HAS FULL AUTHORITY TO REMEDY A PRICE SQUEEZE BETWEEN WHOLESALE AND RETAIL RATES

A. The Concept of "Zone of Reasonableness"

The court of appeals formulated a remedy in the event the Commission found that price squeeze allegations were true:

> "When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness yet create a price squeeze between themselves. There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers." 510 F.2d at 1274.

But the Commission now disagrees, as it did in the court of appeals, by contending that there is no such thing as a "'zone of reasonableness' in electric utility ratemaking because precise data is available and rates are reviewed on a company-by-company basis." (FPC Brief, at 36, n. 31.) The court of appeals, citing the FPC's own *Otter Tail* decision (2 F.P.C. 134, 149

(1940)), hoisted the Commission by its own petard. In the *Otter Tail* case, the Commission had said:

> "It occurs to us that one rate in its relation to another rate may be discriminatory, although each rate *per se,* if considered independently, might fall within the zone of reasonableness. *There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned.* The relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed." *Otter Tail Co., supra* at 149.[7] (Emphasis added.)

In another discrimination case, *Southwestern Public Service Co.,* 33 F.P.C. 343, 354 (1960), the Commission said:

> "We are further aware that there is no precise answer to the question of a rate of return but rather that there is a zone of reasonableness within which the Commission is free to fix a rate. We feel free within the ambit of our statutory authority and the standards of due process to make the pragmatic adjustments which are called for in each particular case. [Citation omitted.] We think this is a case which peculiarly requires such adjustments.
>
> "Southwestern, by the establishment of the rates to the Cooperatives here under consideration, has agreed to what we consider the lower limits of a zone of reasonableness."

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[7] As we point out, *supra,* the purpose of the discriminatory high rates in the early *Otter Tail* case was to force the small municipalities out of business. The Commission found that the company's tactics were to place the wholesale rate so far above its own retail rates that the municipalities would be forced to sell their systems to Otter Tail.

If the "zone of reasonableness" concept was good law in the Commission in 1940 and 1960, why not now?

The courts have recognized that "[r]atemaking is not a science," *El Paso Natural Gas Co.* v. *FPC,* 449 F.2d 1245, 1248 (D.C. Cir. 1971), and that there is considerable room for subjective and judgmental factors. And by far the most subjective part of ratemaking is the determination of a "fair rate of return," a determination which the Commission now tells the Court is most precise.

While it is true that the rate of return determination for *senior* capital is rather precise, that is only one part of the rate-determining process. As Professor Bonbright has explained:

> "... the analyst usually finds no difficulty in computing the cost of senior capital with fair precision. Actual fixed charges on the debt plus actual dividend requirements on the preferred stock represent the annual cost in terms of dollars. The dollar figures are then converted into percentages of each type of capital as measured by the net contribution which the company has received from the issuance of the bonds and of the preferred stock."[8]

The determination of rate of return for common equity, however, is an entirely different matter. As one author stated:[9]

> "By far the most difficult and controversial part of determining the cost of capital is the estimation of the cost of common stock capital.
>
> * * * * *

[8] J. Bonbright, Principles of Public Utility Rates, 244-45 (1961).

[9] P. Garfield & W. Lovejoy, Public Utility Economics, 125 (1964).

> "The big problem is how to estimate accurately the amount of return just large enough 'to assure confidence in the financial soundness of the utility ..., to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties,' while still allowing no more than is 'necessary'."

The zone of reasonableness of return on common equity, and of the correlative rate for electrical service, is the concept to which regulatory commissions and courts have resorted to find fair solutions in this "difficult and controversial" area.

The subjectiveness of the exercise can be appreciated by reference to the comparable earnings test, as set forth in *Bluefield Waterworks and Improvement Co.* v. *Public Service Commission,* 262 U.S. 679, 692 (1923):

> "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties ...."

Or as formulated later:

> "... [T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591 at 603 (1944).

In addition, the test requires the return to be sufficient to attract capital:

> "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." *Bluefield Waterworks* at 693.

Many other subjective factors are relevant in the computation of a fair rate of return for common equity. For example, in *Panhandle Eastern Pipe Line Company* v. *FPC*, 324 U.S. 635, 650 n. 9 (1945), the Court upheld the Commission's consideration of numerous factors, including the fact that "the respondent's business is exceptionally free from serious business hazards."

As the Court stated in *Hope, Bluefield,* and *Panhandle,* one of the subjective factors is risk.[10] Competition is a risk factor.

> "Another type of risk facing every firm in any industry is competitive risk, or the risk of loss of business to other firms offering the same or substitute products or services." GARFIELD and LOVEJOY, *supra* at 122.

Electric public utilities compete with gas utilities and other energy forms, but

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[10] In the Permian Basin Rate Cases, 390 U.S. 747, 807 (1968), the Court upheld the Commission's selection of 12% as the proper rate of return on common equity, recognizing that "producers characteristically have less long-term debt than pipelines, and that the financial risks of production are somewhat greater than those of transmission." (Footnotes omitted.) The Court recognized that "these differences warranted a more generous rate of return for producers." *Id.*

> "In addition, electric utilities in some instances face competition from government-owned or -sponsored electric operations." *Id.*

In the instant case, "risk" certainly is a factor to be considered in rate of return determination since AP&L competes with its wholesale customers for retail customers. Surely anticompetitive conduct which enhances a utility's monopolistic position and which allows a utility to obtain an unfair advantage in attracting new customers reduces a utility's risk of doing business. Therefore, the rate of return for common equity should be reduced to eliminate such an unfair competitive advantage, restoring the public utility and its resale customers to a balanced competitive situation. The "zone of reasonableness" allows such latitude.

B. Procedure Available to the Commission

We envision that the Commission's responsibilities and duties to adjust a price squeeze rate would be invoked in two stages after a rate increase had been filed. First, if a customer should petition to intervene to raise a price squeeze issue, the Commission could examine the validity of the allegation during the suspension period which may not exceed five months. (Section 205(e).) Using the cost of service material filed by the applicant, the reports in the Commission's files, its powers under section 208 of the Act, and by obtaining a copy of the applicant's retail tariff for industrial customers, the Commission certainly would be able to determine whether a prima facie case of discrimination existed. Then the Commission, exercising its powers under section 209 of the Act, could determine whether the applicant had a proceeding pending in a

state commission to increase the retail rate. If no such application were pending which would alleviate the price squeeze, then the Commission could reduce the wholesale rate by summary disposition, pending hearings and a final determination on the proposed rate's lawfulness.[11]

After the issuance of summary disposition, the Commission could proceed with its normal course of hearings before an Administrative Law Judge, briefs, his decision, and a final decision by the Commission itself. That proceeding, of course, would result in a final adjusting of the return on common equity if the price squeeze allegations were found to be valid.

C. The Commission's Objections to the "Zone of Reasonableness" Approach

The Commission has presented an artificial barrier by arguing that if it ordered reductions or adjustments within the zone of reasonableness then the wholesale rate would be less than compensatory.[12] In overstating

[11] Such a summary disposition, with a rate adjustment, cannot be deemed unfair because under present practice a rate, no matter how unreasonable, automatically goes in effect after the suspension period subject to refund following final order. Thus, no matter how onerous the rate may be found years later, by a final order, the consumer suffers until then.

[12] The Commission's brief at n. 33, p. 38, admits that evidence of monopolization "bears upon the risk of investment." But the Commission says "Conway's allegations, however, were not of this kind; rather, it asked the Commission to determine the wholesale rate by reference to nonjurisdictional retail rates." That, we submit, is a non sequitur. How can the Commission consider "evidence of monopolization, which bears upon the risk associated with investment" without looking to the device used to monopolize, the weapon of price? It declined to permit the municipalities to intervene to offer evidence on this issue.

the issue, the Commission poses the hypothetical case whereby wholesale rates must be adjusted to equal retail rates, which the utility may have voluntarily "depressed" (presumably to eliminate the municipality's competition).

The Commission's hypothetical instance of a voluntarily depressed retail rate raises visions of a very low retail rate of return requiring FPC to reduce wholesale rates accordingly. Such a situation probably never would occur because no utility can voluntarily agree to a non-compensatory rate of return on common equity for sales to its retail class and expect to stay in business very long. (Characteristically, as here, retail rates account for more than 90 percent of a utility's revenues, while wholesale sales represent less than 10 percent).

The usual situation, more realistic than the Commission's fanciful hypothesis of a ruinous retail rate, would be one where both wholesale and retail rates produce a rate of return within the zone of reasonableness. In such a situation, the rate of return on common equity to be yielded by the wholesale rate could be reduced a small amount to restore competition, while still retaining a return on common equity which is within the zone of reasonableness. For example, if the industrial retail rate returned 11.2 percent on common equity while the proposed wholesale rate returned 11.9 percent on common, the wholesale return could be adjusted slightly to eliminate a price squeeze situation and both rates would be in the zone of reasonableness, furnishing the company a compensatory return. Thus, the wholesale customer, by virtue of a slight adjustment, would be able to compete for industrial customers with the public utility.

But if some public utility did purposely depress industrial retail rates to an extremely low level in order to eliminate competition, such a company should be estopped from complaining if the Federal Power Commission should reduce the wholesale rate to equal the retail rate which the company voluntarily depressed for this anticompetitive purpose. Since retail sales, here, as elsewhere, produce more than ten times the total revenue produced by wholesale sales, it would seem odd for a company to commit financial suicide by voluntarily depressing its retail rates below a reasonable rate of return on common equity, just to get rid of its pesky wholesale customers. Burning down the house to roast the pig, or drowning the dog to get rid of the fleas, is not normally good business practice. At the least, one would expect the FPC to have some curiosity to find out whether its odd assumption of masochism in setting low retail rates, rather than unlawful motives in setting high wholesale rates, is really true. It has no such curiosity, none at all. We say that the Act requires FPC to generate some interest in tendered evidence on this point, instead of rejecting it, in all cases, out of hand, on the simplistic argument that retail rates are outside of its zone of interest because they are outside of its zone of jurisdiction.

The statute encourages FPC and state commissions to work in concert, not on opposite sides of an iron jurisdictional curtain. Thus FPC "*upon its own motion,* or upon the request of any State commission . . . may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission *in cases where the Commission has no authority to estab-*

lish a rate governing the sale of such energy." (Emphasis added.) (Section 206(b).)

FPC "may refer any matter arising in the administration of this Part to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter . . . . The board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission." (Section 209(a).)

FPC "*may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.*" (Emphasis added.) (Section 209(b).)

Here, the Commission has done none of these things. It disclaims any responsibility for or interest in "the relationship between rate structures," etc., ". . . subject to the jurisdiction of such State commission and of the Commission . . . ."

If FPC did what the statute authorizes it to do, a price squeeze could not survive the joint scrutiny of the federal and state commissions which are being

whipsawed by a company's inconsistent and discriminatory wholesale and retail rate proposals.

It is the FPC's responsibility not just to fix rates in a vacuum, but to make sure that rates are not discriminatory. The surest way to do that is to hold the company to its own representation to the state commission that its retail rates, lower than its proposed wholesale rates, yield it a satisfactory return on the investment.

Instead, FPC chooses to reject evidence that the same company has made contradictory representations to the federal and state commissions, for the prohibited purpose of enabling it to destroy competition.

III. THE COMMISSION'S REFUSAL TO ACCEPT JURISDICTION CREATES A REGULATORY GAP

A. Regulatory Gaps Between the State Commission and the FPC

The Federal Power Act, like the Natural Gas Act, 15 U.S.C. § 717, *et seq.*,[13] granted FPC broad power to protect consumers against exploitation, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944), and Congress intended to create a comprehensive regulatory scheme, although there was to be dual state and federal authority. *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205 (1964). Even with the dual authority, however, Congress desired the Federal Power Commission to exercise broad authority over public utilities "so that there would be no 'gaps' for private interests to subvert the public welfare." *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972).

[13] The history of the Natural Gas Act and precedents thereunder are applicable to the Federal Power Act. FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956).

This Court has explicitly frowned upon vacuums in regulation where the public interest would be subverted thereby:

> ". . . Congress did not desire that an important aspect of this field be left unregulated. [Citation omitted.] Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. [Citation omitted.] That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs." *FPC* v. *Transcontinental Gas Pipeline Co.*, 365 U.S. 1, 19-20 (1961).

Can state authority regulate in the gap which the Commission proposes to create? Certainly not; no one can contend that the States have any jurisdiction over wholesale rates. The answer is for the FPC to assume its congressionally mandated responsibilities. Otherwise, as the court of appeals said, "no institution would have authority to consider an undue preference between wholesale and retail rates, even where that preference was deliberately instituted for the purpose of clogging competition . . . ." 510 F.2d at 1272.

B. The Commission Errs in Desiring to Force the Wholesale Customers to Seek Relief in Federal Courts under the Sherman Act

The Commission blandly walks away from its responsibilities by arguing that no regulatory gap exists because "the price squeeze alleged herein . . . is cognizable in the federal courts" under the Sherman

Act, 15 U.S.C. § 1 *et seq.* (Brief at 41). The Commission's position, however, ignores the teaching of this Court that:

> "Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing *a first line of defense* against those competitive practices that might later be the subject of antitrust proceedings." *Gulf States, supra* at 760 (emphasis added).

The Commission not only is unwilling to exercise its "important and broad authority" to maintain competition "to the maximum extent possible," and to establish "a first line of defense," but it is unwilling even to send out a scout. The FPC's position is all the more untenable considering that it told this Court in *Gulf States* that it did have authority to prevent anticompetitive conduct under sections 205 and 206. *Gulf States, supra* at 757.

CONCLUSION

For the foregoing reasons, the American Public Power Association, as amicus curiae, recommends that the decision of the court of appeals be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-342

FEDERAL POWER COMMISSION,
Petitioner,

vs.

CONWAY CORPORATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF COMMONWEALTH EDISON COMPANY.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Commonwealth Edison Company ("Edison") respectfully requests leave to file *instanter* the within brief *amicus curiae*. The interest of Edison in the matter at bar is as stated in the Statement of Interest in the brief.

While Edison is an electric utility which may be affected by the decision in the case at bar, Edison believed that the present litigation should be left to the parties and, accordingly, did not request leave to file a brief *amicus curiae* at an earlier date. Subsequently, however, other briefs *amicus curiae* were filed raising arguments and alleging facts not placed in issue by the parties. One of those briefs was filed by six municipal corporations which are parties to litigation involving Edison. Upon

learning of the contents of those briefs, Edison promptly undertook preparation of the within brief.

Edison supports the position of the Petitioner, the Federal Power Commission, but does not intend the within brief to be a repetition of arguments already put forth by the parties in this case. Rather Edison believes that its briefs deals, in a manner different from that of the parties, with the respective roles of the federal and State governments in the regulation of electric utilities. Edison's brief also includes information concerning the regulatory process which is not considered in the briefs of the parties. In view of the nature of the case at bar and the arguments urged by the other *amici*, Edison believes that its arguments and information will assist the Court in deciding the case at bar and that Edison should be granted leave to file its brief notwithstanding the lateness of the hour.

Edison was unable to secure the consent of the respondent Conway Corporation to the filing of this brief. Counsel for the Federal Power Commission and for Arkansas Power & Light Company have authorized Edison to state that those parties have no objection to Edison's filing of a brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF COMMONWEALTH EDISON COMPANY.

STATEMENT OF INTEREST.

Commonwealth Edison Company ("Edison") is an electric utility that serves customers in Chicago and Northern Illinois. Edison has seven municipal customers which purchase electricity for resale. These sales are subject to regulation by the Federal Power Commission and account for something less than 1% of Edison's total revenues. In this respect Edison is typical of many large investor-owned utilities.

Six Illinois municipalities that purchase electricity from Edison have filed a brief *amicus curiae* in this proceeding. That brief states that the outcome of this case "will likely govern" litigation

between Edison and those municipalities which is now pending before the FPC and the United States Court of Appeals for the District of Columbia Circuit. The decision in this case need not determine the outcome of that litigation.[1]

Edison offers this brief *amicus curiae* because it fears that the briefs of certain of the parties and *amici* in this case tend to create a somewhat simplistic and erroneous view of the relationship between federal and State electric rate regulation. Edison believes that this brief *amicus* will assist the Court in understanding the complexities of the regulatory process and the potential impact of this case upon the electric utility industry.

1. In Edison's case the Commission found, after a complete hearing on the merits, that a price differential was justified on cost grounds. See n. 12, *infra*.

SUMMARY OF ARGUMENT.

Electric utilities are not free to charge whatever rates they choose. State and federal regulatory commissions specify the rates to be charged for sales to ultimate consumers and to resellers, respectively. Differences in statutory authority and regulatory philosophy between the State and federal commissions are likely to produce differences between wholesale and retail rates.

In directing the Federal Power Commission to review rates set by State agencies, the Court of Appeals upset the relationship between State and federal powers as enunciated in the Federal Power Act. In addition, in so directing the FPC, the Court of Appeals was requiring actions which are virtually impossible as a practical matter and which will lead to regulatory confusion. The action of the Court of Appeals is not required by any federal law and it is not required to close any "gap" in the regulation of electric utilities.

The FPC and Arkansas Power & Light Company have ably argued at pp. 10 to 27, and pp. 10 to 17 of their respective briefs that the Federal Power Act does not reach claims of interjurisdictional rate discrimination. Edison concurs in these arguments.

ARGUMENT.

I.

WHOLESALE AND RETAIL RATES DIFFER FOR MANY REASONS BEYOND THE CONTROL OF THE UTILITY.

A. The State-Federal Regulatory Scheme.

Electric utility rates are subject to regulation at both the State and federal levels. In general, State public utility commissions regulate sales to ultimate consumers while the Federal Power Commission regulates sales for resale. Thus, it is often said that the States regulate retail transactions while the FPC

regulates wholesale transactions. This is somewhat misleading however because a single industrial consumer served at "retail" may use many times the electricity purchased by a municipality served at "wholesale". In any event, the rates governing both wholesale and retail sales by an electric utility are regulated and cannot be established or changed without being submitted to the scrutiny of the appropriate regulatory body.

B. The Theory of Utility Rate Making.

The theory of agency rate-making, both on the State and federal level, is relatively simple. The value of the property devoted to public use is ascertained and the rates are set so as to allow a reasonable return on this "rate base" after all expenses have been met. The sum of the reasonable return and the expenses is frequently referred to as the "cost of service".

In practice, of course, rate-making is nowhere near as simple, particularly when a regulatory commission has jurisdiction over only a portion of a utility's rates. In that case the commission must allocate the total rate base and the total expenses between jurisdictional and non-jurisdictional customers. The rates must then be set so as to recover the total cost of service allocable to the jurisdictional customers.

When a regulatory commission has determined the total revenue which a utility is entitled to earn under the jurisdictional rates, the commission must decide what portion of those revenues is to come from each customer. For this purpose customers are usually divided into classes which are served under different rates. Classes may be established on the basis of use characteristics, such as street lighting, space heating, and high voltage delivery, or they may be based on customer characteristics, such as residential, commercial, and industrial.

The rates paid by the different classes of customers are usually different. Sometimes a class of customers pays a low rate, relative to other classes, for obvious reasons. An interruptible customer, for example, pays less for service than a firm customer because the utility can discontinue service to

the interruptible customer during those periods when the demands of firm customers are heavy. Sometimes the reason for a difference in rates depends upon less obvious factors, such as the time of day or the season of the year in which the class of customers makes its heaviest demands on the utility.[2]

At the State level there may be a score of different customer classes with varying degrees of differences between them. At the FPC level the situation may be a bit simpler, but the FPC, too, is called upon to divide customers into classes which are charged different rates.[3] The division of customers into classes is important because when one class of customers pays less, another must pay more since, by law, the total cost of service to all the jurisdictional customers must be met by the jurisdictional rates. It is also a matter of simple economics that the total cost of service must be recovered if the utility is to remain financially viable.

In defining the classes into which a utility's customers are divided, and in determining the rates to be paid by each such class, a regulatory commission must exercise substantial discretion. Frequently that discretion is exercised on non-economic grounds. For example, rates for "lifeline" service to elderly and low income customers have been established by many commissions. The rates for these services are typically below the rates for normal residential service and any revenue deficiencies are made up by other classes of customers. Alternatively, a State commission could set industrial rates at a relatively low level, in order to attract industry to the state, while increasing commercial and residential rates.

Even when a commission tries to be guided by strictly economic factors, however, it must still exercise a great deal of judg-

2. A more extensive discussion of the numerous bases for customer classifications and rate differentials may be found in Bonbright, "Principles of Public Utility Rates" (1961), which also explains in detail the theory of rate making summarized in the text, and Caywood, "Electric Utility Rate Economics" (1972 Ed.) pp. 67, *et seq.*

3. See, *e.g.*, *St. Michaels Utilities Commission* v. *Eastern Shore Public Service Co. of Maryland*, 35 FPC 591 (1966).

ment. A modern electric utility maintains an integrated system of generation, transmissison and distribution facilities. Therefore, cost allocation to classes of customers is not a question of determining what facilities serve what customers, but rather a question of determining what fraction of the total cost of each single facility should be allocated to each customer. There are something over two dozen theories of cost allocation which have been recognized by academic and professional authorities.[4] Moreover, in recent years the whole concept of designing rates on the basis of an allocation of past costs has been questioned and consideration is being given to the view that rates should be set on the basis of the contribution which each class of customers is expected to make to future costs.[5]

C. Differences in State and Federal Approaches to Rate Making.

Clearly then when the parties in the case at bar speak of the cost of service properly chargeable to one or another class of customers, they are talking about a number which is "correct" only in terms of the methodology of the agency making the determination. Two agencies looking independently at the cost of serving the same two classes of customers, such as wholesale and industrial, might well, indeed probably would, arrive at different determinations of the cost of serving each class. They would therefore establish different rates for service to each class.

Regulatory authorities also differ among themselves on an even more basic level than the *allocation* of costs. They differ

4. The National Association of Regulatory Utility Commissioners' "Electric Utility Cost Allocation Manual" (1973) explains the effects of using several different allocation methods and cites earlier NARUC studies comparing additional methods. See also Garfield and Lovejoy "Public Utility Economics" (1964), pp. 138-141. In a recent Illinois Commerce Commission rate case (Commonwealth Edison Co., Docket 59359, 1975) four allocation studies showed returns for large industrial sales ranging from 8.43% to 10.01%. The same studies showed returns for the FPC-established rate for sales to municipalities ranging from 2.85% to 3.83%.

5. The leading decision in this regard is *Re Madison Gas and Electric Company*, 5 PUR 4th 28 (Wisc. Pub. Serv. Com. 1974), although there is also an extensive academic literature. See Kahn, "The Economics of Regulation", Vol. I (1970).

respecting the determination of the *total* cost of service. The FPC and some State commissions, for example, determine rate base on an original cost basis. This means that the book cost of property, less depreciation, is used. Other State commissions are statutorily required to use a "fair value" rate base which requires some determination of the present, as distinct from the original, value of the property.[6] There are innumerable other differences in methodology between the FPC and the States which produce differences in rates.[7]

Yet another reason for differences between wholesale and retail rates is that the Federal Power Commission and State commissions operate in entirely separate procedural frameworks. The Federal Power Act permits rate filings to become effective on 30 days' notice (or immediately with the FPC's permission), subject to the FPC's power to suspend the rates for not more than five months. Rates are typically made effective subject to refund, contingent upon the outcome of hearings. Hearings may, and do, continue for years.

Each State has its own set of procedural rules. Some permit rates to be placed in effect immediately, under bond. Others

6. Some States use fair value without statutory compulsion. A discussion of the differences between fair value and original cost, along with a list of States subscribing to each theory can be found in Priest, "Principles of Public Utility Regulation" (1969), pp. 143-165.

7. The briefs of both Conway and American Public Power Association would have the Court believe that the FPC has been in the forefront of regulatory efforts to cope with inflation, regulatory lag, and other problems of rate-making and has thereby benefitted utilities at customers' expense. In point of fact, those FPC practices generally recognized as beneficial to utilities (such as use of a future test year and "normalization" accounting) were adopted only after State commissions had accumulatd experience with them. See, *e.g.*, FPC Orders 504 and 530, and compare FPC Order 487 with *Southern California Edison Co.*, 100 PUR 3d 257 (Cal. Pub. Util. Com. 1973), or *Rochester Gas and Electric Corp.*, Docket 25595 (N. Y. Pub. Serv. Com. 1971). We would in any event deny that these practices operate to the detriment of customers. The FPC has always determined total cost of service very conservatively and has never adopted such commonly accepted practices as use of a year-end rate base or an attrition allowance.

have developed procedures for emergency or interim rate increases. A variety of other procedures are also in use.

Today, because the FPC and the State commissions regulate separate types of service, neither the federal nor a State agency need be concerned about the effectiveness of rates in the other jurisdiction. There is therefore no effort to coordinate rate increases. Each agency is concerned only with the cost of jurisdictional service, with it determines in its own way, and each sets rates so as to produce revenues adequate only to cover those costs.

II.

THE COURT OF APPEALS' DECISION LIMITS STATE REGULATION OF UTILITY RATES CONTRARY TO THE FEDERAL POWER ACT.

The foregoing discussion of rate-making practices illustrates the variety of reasons, all having legal sanction, which may underlie differences in utility rates. Because rate differentials may be justified, a mere difference in rates does not constitute discrimination; indeed, it does not even constitute a *prima facie* showing of discrimination, *Wisconsin* v. *FPC*, 373 U. S. 294, 307 (1963). The number of possible reasons for differences in rates also renders unworkable the practices suggested in the opinion of the Court of Appeals. Contrary to the view apparently held by that Court, the FPC cannot readily compare jurisdictional and non-jurisdictional rates. Such a comparison would require that, in addition to its normal review of wholesale rates, the FPC perform analysis of some or all of the utility's retail rates.[8] The FPC has no particular expertise in

8. A large utility may have dozens of retail rates, each tailored by the State commission to a particular purpose. While the municipalities in the case at bar have directed their complaints at one particular industrial rate, there is no logical basis for stopping at that point. Not only do the municipalities also claim to compete for non-industrial load, but it would be necessary to study non-industrial rates in order to determine how the State commission allocated costs to industrial service. As the Court of Appeals pointed out, FPC rate cases can become interminable as it is. At the close of 1975, the

(Continued on next page)

performing the latter task. Moreover, what standards would the FPC use in such an analysis? Obviously, wholesale and retail rates can be compared meaningfully only if a consistent set of standards is used. In looking at retail rates, not only is the FPC likely to be unfamiliar in detail with the methodology of the State commission which set those rates, but the opinion of that commission may very well not articulate the social and economic policies which underlie the State commission's decision. In any event, even if the FPC could utilize the State criteria for analytical purposes it would be powerless to use those criteria to analyze wholesale rates unless the FPC were prepared to set wholesale rates in accordance with the appropriate State public utility act instead of the Federal Power Act.

It is equally improper for the FPC to use federal rate-making standards to review State-determined rates. Even if the FPC were to find that the State commission had erred and set those rates too low, all of the parties to this case agree that the FPC would have no power to raise them. Since the FPC cannot change retail rates it can remedy an unreasonable differential resulting from excessively low retail rates only by lowering wholesale rates to the same level. Instead of limiting the effect of the State commission's "error", the FPC would expand it. At the same time, the State commission would be exercising substantial control over federal rates. This is just as improper as federal control over State rates.

Even if the FPC could compare wholesale and retail rates, how often should such comparisons be made? Each time the State rates change? Edison has raised its wholesale rates twice since 1958, once in 1970 and once in 1974. During that period retail rates were raised six times and exceeded wholesale rates for substantial periods. Presumably, under the "price squeeze" theory being urged on the Court, the wholesale rates were dis-

FPC had 979 electric rate cases pending, including rate increase requests of over $600 million (FPC Release 22161, 2/20/76). Add the complication of reviewing retail rates and it is difficult to see how the Commission will be able to meet its workload.

criminatorily low during such periods. Should the FPC have raised those rates to avoid discrimination? Should the Illinois Commerce Commission have refused to raise retail rates to a level above wholesale rates, thereby allowing the FPC to effectively control retail rates even though all the parties agree that the FPC has no power to do so? In addition, what would be the effects of a comparison of particular wholesale and retail rates on a utility's other FPC-regulated rates? Would they be raised to restore jurisdictional revenues to the level determined by the total cost of jurisdictional service and, if so, would that not result in intra-jurisdictional discrimination?

Inescapably, the differences in State and federal procedures dictate that there will be periods when rates will not be the same, no matter how diligently the FPC, the utility, and its customers pursue the matter. As an example, Edison sought wholesale and retail rate relief contemporaneously in the autumn of 1974. While the wholesale rates were placed into effect rather quickly, they are subject to refund and the FPC rate case is still at the hearing stage.[9] The State commission granted relief, in two stages, somewhat later than the FPC, but the State rate case has been over, and the rates no longer subject to refund, since August of 1975. As this experience demonstrates, even a direct attempt to co-ordinate increases in wholesale and retail rates is not likely to succeed.

While the procedural difficulties raised by the Court of Appeals' opinion are substantial, they are overshadowed by the policy considerations ignored by that Court. As the parties have pointed out in their briefs, the Federal Power Act was circumscribed by Congress to insure that the States would retain their right to regulate sales of electricity to ultimate consumers. It is a necessary condition of the Court of Appeals' decision, however, that the FPC review the determinations of State rate-making agencies. A claim of inter-jurisdictional discrimination must be either a claim that the wholesale rate is too high or that the retail rate is too low. Under the Federal Power Act the FPC must examine wholesale rates to insure that they are not too high, even when there is no allegation of discrimination. Therefore, the change in practice mandated by the Court of Appeals must be that the FPC will examine the level of retail rates and determine if they are too low. Effectively, the FPC will be empowered to determine that a State agency had erred, even though there were adequate State-law grounds for that agency's decision. To all practical intents and purposes the FPC would serve as a forum for collateral attacks on the rate-making decisions of State utility commissions. That in itself violates the intent of the Federal Power Act as well as the traditional prohibition on collateral attacks on agency rulings.[10] The Court of Appeals seems to go even further. It seems to suggest that the FPC perform what appears to be a *de novo* review of the retail rates so that even the ordinary presumption of propriety attached to the actions of State agencies, *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55 (1937), is not to be present when the FPC reviews retail utility rates.

We submit that these problems arise because of the Court of Appeals' misconception of the role of the FPC. The Commission has stated that it is prepared to consider the competitive effects of utility rates in situations in which a remedy can be fashioned. Indeed, the Commission has done so for many years. *Georgia Power Co.*, 35 FPC 436 (1966). The Court of Appeals now suggests that the FPC is a forum before which a utility can be required to justify its actions in seeking retail rate increases, and

9. When revenues are collected subject to refund that fact must naturally be noted in financial statements and financing documents. Under some accounting treatments, revenues subject to refund are not includable as income. Typically, revenues collected subject to refund may not be used to meet the interest coverage tests imposed by mortgage indentures.

10. *United States* v. *Jones*, 336 U. S. 641 (1949). It is also contrary to the rule that proof of anti-competitive intent, and of rate discrimination itself, be made by the complainant. The burden of proof is not on the utility when a rate already approved is in issue. *Atlantic Refining Co.* v. *Pub. Serv. Com. of N. Y.*, 360 U. S. 378 (1959).

also the actions of the State body regulating retail rates. Apparently such justification is to be required regardless of whether the rate increases sought are, in the FPC's opinion, economically mandated. This is a perversion of the dual regulatory scheme established by Congress and the States. Congress' expressed preference for State regulation should not be disregarded by using anti-trust theories to turn the FPC into a reviewer of State actions.[11]

III.

THE COURT OF APPEALS IS MISTAKEN IN PERCEIVING A "REGULATORY GAP."

The Court of Appeals reasoned that FPC review of State rate decisions was necessary to avoid a "regulatory gap". This reasoning assumes that there is no authority other than the FPC with the power to consider whether retail rates are too low. In fact, there is such authority—the State regulatory commission itself. The procedure is actually quite common, *e.g.*, *Re Southwest Gas Corp.*, 61 PUR 3d 467 (Cal. Pub. Util. Com. 1965) and cases cited in Priest, *supra*, at pp. 309-324. Intervention by a utility's competitors is not at all unusual in rate cases. See, *e.g.*, *Re Portland General Electric Co.*, 67 PUR 3d 417 (Ore. Pub. Util. Com. 1967). There have been instances in which courts have held that competitors may intervene as of right in order to urge their competitive interests, *Seaboard-Western Airlines* v. *CAB*, 181 F. 2d 515 (D. C. Cir. 1949), although Professor Davis suggests that authorities are few because administrative intervention is so readily allowed competitors. Davis, "Administrative Law Treatise", § 8.11.

11. When a utility rate is set by a State agency, that rate should, in any event, be immune from attack on anti-trust grounds. Utility rates are a matter of significant State interest and in establishing public utility commissions the State legislatures obviously intended to delegate their authority to limit competition. *Parker* v. *Brown*, 317 U. S. 341 (1943), *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975).

The thought of approaching a State agency for relief should not discomfort wholesale customers. They, themselves, are creatures of the State and their customers are citizens of the State. A typical State rate case will involve separate interventions by several classes of residential customers, commercial customers, industrial customers, retail governmental customers, and so forth. Each of these customers usually argues that the burden of any rate increase ultimately authorized should be placed upon some other class of customers. It would probably be refreshing for the State commission to have the views of an outside party concerning both the allocation and the amount of rate increases. Of more importance, a wholesale customer's appearance before the State commission would allow that body to more effectively consider all the implications of its social and economic judgments.

IV.

THE COMMISSION SHOULD BE SUSTAINED IN ITS DECISION TO EXCLUDE CLAIMS OF INTER-JURISDICTIONAL RATE DISCRIMINATION FROM RATE PROCEEDINGS.

The Federal Power Commission's decision in this case was that rate-making proceedings not be burdened by considerations of inter-jurisdictional rate discrimination. In so doing; the Commission did not say that it would never consider a claim of anti-competitive conduct by a regulated utility.[12] The Commission only stated that it could not provide a remedy for the specific conduct alleged in the context of a rate case. This was a valid exercise of the Commission's discretion regarding the subject matter limitations in a complex and technical proceed-

12. See, *e.g.*, FPC Opinions 681 and 681A *Commonwealth Edison Co.*, Docket E-7578, one of the earliest "price squeeze" cases. The Administrative Law Judge allowed the intervenors to present such evidence of discrimination and anti-competive purpose as they cared to. After a procedurally difficult hearing on the merits, the FPC concluded that an existing rate differential was cost justified. After such early experiences the FPC apparently learned the fruitlessness of the kind of inquiry now ordered by the Court of Appeals and determined not to burden rate cases with such matters.

ing, *Union of Concerned Scientists* v. *AEC*, 499 F. 2d 1069 (D. C. Cir. 1974), *American Airlines* v. *CAB*, 495 F. 2d 1010 (D. C. Cir. 1974), and was clearly the type of action contemplated by this Court in its ruling in *Gulf States Utilities Co.* v. *FPC*, 411 U. S. 747 (1973), that in an appropriate case the FPC may defer complaints of anti-competitive actions, or dispose of them without hearing. The Commission acted as it did because it knows what the Court of Appeals did not readily understand—that attempts to compare wholesale and retail rates would lead to unmanageable proceedings and fruitless conclusions.

Another fact known to the FPC and apparently forgotten by the Court of Appeals is that electric utilities are in no financial condition to reduce retail rates for the sole purpose of harming wholesale customers. The bulk of revenues comes from retail sales. If, like the Court of Appeals, we permit ourselves to "peak ahead into the merits," we find it unlikely that any utility would voluntarily sacrifice revenues today. As Treasury Secretary Simon stated in his statement to the Senate Finance Committee on March 17th of this year:

> A recapitulation of the problems of the electrical power industry may be helpful. When fossil fuel prices started their rapid rise in mid-1973, the consequence for electric utilities, whose rates are regulated, was a shrinkage in the residual cash-flow. This reduced the return to equity and made increasingly difficult the simultaneous (1) maintenance of dividend payments which were needed to continue to attract and hold equity capital, (2) payment of interest on obligations to bond-holders, and (3) carrying out of investment programs to replace existing capacity as well as to add additional capacity needed to meet forecast growth in demand for electric power.
>
> This squeeze on the electric power industry, resulting from what is commonly called "regulatory lag" or the slow adjustment of allowable prices to reflect changed cost conditions, was exacerbated by two other factors: the actual costs of replacement capital were pushed-up by inflation while the allowances for this portion of capital cost embedded in utility rate structures remained unchanged; and interest rates on refunding and new issues of bonds rose to incorporate the inflation premium. For many utility companies the resultant drop in realized return to equity owners was so severe that dividend payments were suspended and/or construction programs were cancelled or suspended.

Fully aware of the economic difficulties facing the electric utility industry and the problems of regulatory lag in rate-making procedures, the FPC was justified in not expanding the scope of the rate case which is on appeal here.

Every proceeding before an administrative agency cannot be a general "bill of peace" which settles all of the disputes between the parties. Subject matter limitations are necessary and proper in the administrative process. In the present case the Federal Power Commission undertook to examine the reasonableness of a set of wholesale rates. It refused to consider an attack on retail rates set by a State agency. In limiting the proceedings to the question of whether wholesale rates are too high, while leaving the parties to any other remedies they may have, State or federal, with respect to the question of whether retail rates are too low, the FPC was engaged in a valid exercise of administrative discretion. It should be sustained.

CONCLUSION.

The decision below upsets the dual system of federal and State regulation of electric utilities and is therefore contrary to the Federal Power Act. It is also an impractical and unreasonable limitation on the administrative discretion of the FPC to establish the scope of rate cases. For these reasons the Court of Appeals should be reversed and the decision of the Federal Power Commission sustained.

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